



Digitized by the Internet Archive
in 2019 with funding from
State Library of North Carolina

North Carolina State Library
Raleigh

21377
2.2

JONES' QUIZZER

CONSISTING OF

NORTH CAROLINA SUPREME COURT
QUESTIONS AND ANSWERS

From September Term, 1898 to
August Term, 1920

PREPARED BY
GILMER A. JONES
Solicitor 20th Judicial District
Franklin, N. C.

Copyrighted 1921
by
GILMER A. JONES

ALL RIGHTS RESERVED
PUBLISHED BY
FOOTE & DAVIES CO.

PRESS OF
FOOTE & DAVIES CO.
ATLANTA

PREFACE

The first edition of this work was published shortly after the author had been admitted to the bar with the idea of furnishing the law students of the State a means of reviewing the most important principles of North Carolina law.

The favorable reception accorded the first edition by the practitioner as well as the law student caused the author to arrange a second edition in a more comprehensive form, hoping it might be used as a digest as well as a quiz. The questions have been carefully grouped and arranged under the various subjects and these subjects arranged in alphabetical order. The text of the first edition was carefully gone over and the most important questions given by the Supreme Court since 1916 were added. On account of the arrangement in this edition an index is unnecessary.

It is the hope of the author that this edition will be received with the same consideration as was the first and that it will prove to be a book of ready reference and a time-saver to the practicing attorney, as well as an aid to the student, in acquiring a thorough knowledge of the fundamentals of the law.

TABLE OF CASES

Abbot v Hunt	129 NC 403	1171
Ager v Murray	105 US 126	1116
Alderman, Ex parte	157 NC 507	172
Alexander v Statesville	165 NC 527	1083
Allred v Smith	135 NC 443	661
Alpha Mills v Engine Co.	116 NC 797	1180
Alsop v Bowers	76 NC 168	1469
Alston v Connell	140 NC 485	
American Pub Co v Fisher	166 US 464	960
Amy v Barkeholder	11 Wall (US)	
	136	1067
Anderson, In re	132 NC 243	132
Anderson v Wilkins	142 NC 154	167, 1298
Andrews v Pope	126 NC 472	1187
Arrington v Arrington	127 NC 190	1003
Ashford v Pittman	160 NC 45	60
Ashford etc Co v Schrader Co.	167 NC 45	1258, 1261, 1272
Askew v Matthews	175 NC 187	815
Atkinson v Graves	91 NC 99	1247
Austin v Murdock	127 NC 454	378
Avery v Lbr Co.	146 NC 592	1095
Avery v Stewart	136 NC 426	1352, 1357, 1358, 1360, 1362
Baldwin's will, In re.....	146 NC 25	1429
Ball v Paquin	140 NC 91	877, 832
Bank v Fountain	148 NC 590	701
Bank v Hay	143 NC 326	1177, 1182
Bank v Lineberger	83 NC 454	1194, 1195
Bank v RR	153 NC 346	1248
Bank v Swink	129 NC 255	1191
Bank v Taylor	122 NC 569	69
Banking Co. v Morehead	116 NC 410	589
Barcello v Hapgood	118 NC 712	394
Barger v Hickory	130 NC 550	1067
Barrington v Ferry Co.	69 NC 165	572
Barker v RR	125 NC 596	505
Barnes v Raper	90 NC 189	547
Bass v Navigation Co.	111 NC 439	572
Baxter v Farmer	42 NC 239	683
Bayard v Singleton	1 NC 5	145, 1301
Beauchamp, In re	146 NC 254	1432
Bell v McJones	151 NC 85	781, 884
Bernhardt v Brown	119 NC 506	412

Berry v RR	122 NC 1002	119
Blackburn v Lbr Co.	152 NC 361	1087
Blackwell v Blackwell	124 NC 269	1443
Bland v Beasley	140 NC 628	705
Bleakley v Candler	169 NC 16	361
Board of Education v Comrs.	174 NC 47	262
Boddie v Bond	154 NC 359	608, 676, 679
Boggan v Somers	152 NC 390	527
Bond v Beverly	152 NC 56	21
Bordeaux v RR	150 NC 528	1038
Bowen v King	146 NC 385	482, 1082, 488
Bradshaw v Millikin	173 NC 432	305
Bragaw v Supreme Lodge	124 NC 154	695
Brewster v Elizabeth City	137 NC 392	1085
Bridgers v Bank	152 NC 293	310
Brightingham v Stadiem	151 NC 299	858, 860
Britton v Ruffin	123 NC 67	430, 1256, 1259
Brittain v Westall	137 NC 30	712
Brown v Brown	121 NC 8	532, 877
Brown v Morris	83 NC 251	1179, 1181
Brown v RR	131 NC 455	404
Broderick's will	21 Wall (US)	
	503	778
Bryan, In re	60 NC 42	135, 822
Bryan v Malloy	90 NC 508	688, 1483
Burnett v RR	163 NC 186	766
Burns v Womble	131 NC 173	1093, 1094, 1328
Burrus v Witecover	158 NC 384	319
Butner v Blevins	125 NC 585	783
Campbell v McCormack	90 NC 491	78
Cannaday v RR	143 NC 439	317
Canter v Chilton	175 NC 406	29
Capitol Traction Co v Holf	174 US 1	960
Capps v Capps	85 NC 408	16
Carriage Co v Dowd	155 NC 307	1189
Carter v Slocumb	122 NC 475	1165
Carter v White	134 NC 466	35, 668
Caudle v Caudle	176 NC 537	560
Cawfield v Owens	129 NC 286	832
Chappell v White	146 NC 571	1339
Cheese Co v Pipkin	155 NC 394	1277
Cherry v Slade	7 NC 82	108
Chisholm v Ga	2 Dall (US)	
	419	193
Christmas v Winston	152 NC 48	1451
Clark v Clark	65 NC 655	1474

TABLE OF CASES

ix

Clark v East Lbr Co	158 NC 139	1174
Clement v King	152 NC 456	949
Clifton v Owens	170 NC 607	321, 323, 324
Coble v Beall	130 NC 533	381
Cochran v Mills Co.	169 NC 57	1035
Cogdell v Exum	69 NC 464	1136
Cole's will, In re	171 NC 74	1414
Coley v RR	129 NC 407	769, 778, 1208
Comrs v McDonald	148 NC 125	1069
Comrs v Spencer	174 NC 36	728
Converse, In re	137 US 624	205
Copeland v Tel Co.	136 NC 11	970
Corp Commission v RR	137 NC 1	1206
Cornell University v Fiske	1136 US 152	36
Cotton v Moseley	159 NC 1	526
Cowan v Roberts	134 NC 415	820
Crawford v McCarthy	159 NY 515	1455
Crews v Crews	175 NC 168	543
Critcher v Porter Co.	135 NC 542	490
Crockett v Bray	151 NC 615	20
Culbreth v Downing	121 NC 205	1006
Cullifer v RR	168 NC 309	1088
Currie v Gilchrist	147 NC 648	109
Currie v RR	156 NC 419	1295
Darden v Allen	12 NC 466	63
Davis v Kerr	141 NC 11	1338, 1351
Davis v RR	134 NC 300	1210
Davis v Yelton	127 NC 348	1382
Deans v RR	107 NC 686	1209
Deaver v Deaver	137 NC 241	720
Deligny v Fur Co.	170 NC 189	1036, 1096
Denny v Burlington	155 NC 33	314
Doyle v Brown	72 NC 393	939
Driller Co. v Worth	117 NC 515	1214
Drum v Miller	135 NC 204	896
Duckworth v Jordan	138 NC 520	321, 1467
Dunn v Keeling	13 NC 283	1164
Dunlap v Raleigh etc R Co.	167 NC 669	1033
Dupree v Dupree	45 NC 164	512
Durham v Cotton Mills	141 NC 615	1397
Eames v Armstrong	142 NC 506	430, 432, 435
Echard v Johnson	126 NC 409	104
Edwards v Culberson	111 NC 342	1364
Edwards v Lemmond	136 NC 329	756
Electric Co v Williams	123 NC 51	597, 1280

Elizabeth City v Banks	150 NC 407	566
Elliott v Loftin	160 NC 361	323
Elliot v RR	155 NC 235	1250
Ellis v Trustees	156 NC 10	255
Engine Co v Pasehal	151 NC 27	303
Evans v Freeman	142 NC 61	87
Everett v RR	138 NC 68	61
Faircloth v Isler	75 NC 551	1378
Farmer v Pickens	83 NC 549	986
Farrell v RR	102 NC 390	1267
Faust v Faust	144 NC 383	320
Fleming v Barden	126 NC 450	1194
Fleming v RR	160 NC 196	770
Fortune v Harris	51 NC 532	60
Foundry Co v Killian	99 NC 501	408, 409
Frazier v Frazier	129 NC 30	1059
Freeman v Belfer	173 NC 581	850, 870
Freeman v Cook	41 NC 373	1371
Fuller v Jenkins	130 NC 554	1059
Gelback v Shilvey	67 Md 498	1455
Gibbons v Ogden	9 Wheat (US)	
	193	164
Gilliam v Edmonson	154 NC 127	670
Godette v Gaskill	151 NC 52	1472
Gooch v Faucett	122 NC 270	306, 319
Gorrell v Alspaugh	120 NC 362	1356
Gorrell v Water Co.	124 NC 328	795
Gordon v Gordon	88 NC 45	543
Gordon v US	117 US 705	170
Grant v Williams	28 NC 341	746
Graves v Comrs	135 NC 49	1065
Gray v Bailey	117 NC 439	867
Green v Rodman	150 NC 176	1063
Gregory v Oil Co.	169 NC 454	1043
Grogan v Ashe	156 NC 296	1456
Hadley v Baxendale		491
Hall v Harris	40 NC 303	603
Hall v Misenheimer	137 NC 183	793, 794, 803, 1380, 1381
Hall v RR	146 NC 345	689
Hallyburton v Slagle	130 NC 482	518
Hallyburton v Slagle	132 NC 947	671
Hamilton v Highlands	144 NC 279	290
Hamilton v Lbr Co.	160 NC 47	1091

TABLE OF CASES

xi

Hampton v McConnell	3 Wheat 234	171
Hancock v Tel Co.	142 NC 163	481, 694
Handley v Stultz	139 US 417	409
Hare v Jernigan	76 NC 471	516
Harmon v Contracting Co.	159 NC 22	1033
Harrington v Greenville	159 NC 632	1070
Harrington v Harrington	142 NC 517	562
Harrington v Wadesboro	153 NC 437	1072
Harrison v Ray	108 NC 215	864
Harvey v Imp Co.	118 NC 693	371
Hatch v Hatch	3 NC 32	1428
Hauser v Craft	134 NC 319	102, 1009, 1241, 1242
Hauser v Fur Co.	174 NC 463	1045
Hawkins & Glenn	131 US 319	1011
Hayes v RR	141 NC 195	485
Helsaback v Doub	167 NC 205	891
Henderson v McLain	146 NC 329	1214
Hepinstall v Rue	75 NC 78	298
Herndon v Ins Co.	111 NC 384	216
Herring v Dixon	122 NC 420	1315, 1318
Herring v Outlaw	70 NC 334	16
Hicks v King	150 NC 370	1054
Hightower v Raleigh	150 NC 569	1313
Highway Commission v Webb	152 NC 710	1069, 1312
Hill v Dalton	140 NC 9	110
Hilliard v Newberry	153 NC 104	1188
Hines v Lbr Co.	174 NC 294	1086
Hines v Mercer	125 NC 71	1408
Hines v Rocky Mount	162 NC 409	1074
Hinkle v RR	126 NC 932	117
Hocutt v Tel Co.	147 NC 186	483
Hodges v RR	105 NC 170	280
Hodges v Wilkinson	111 NC 56	1257
Hodgin v Bank	128 NC 110	1113
Hodgin v Bank	124 NC 540	72
Hoke v Henderson	15 NC 1	1105
Hollowell v Borden	148 NC 255	255
Holt v Warehouse Co.	116 NC 480	366
Holton v Jones	133 NC 399	1461
Hood v Mercer	150 NC 699	865
Hooker v Nichols	116 NC 157	24
Hooper v Moore	48 NC 428	1474
Horton v Seaboard	233 US 492	770
Hosiery Co v Cotton Mills	140 NC 452	493
House v Arnold	122 NC 220	1020
Houser v Fayssoux	168 NC 1	102, 1009

Houston v Smith	88 NC 312	547
Howard v Turner	125 NC 107	510, 808
Howell v Mehegan	174 NC 64	1460
Howerton v Tate	66 NC 231	16
Hudnell v Lbr Co.	133 NC 169	993
Hudson v RR	176 NC 488	1081
Huges v Boone	102 NC 137	53
Hull v Roxboro	142 NC 453	1073
Hunter v Randolph	128 NC 91	1251, 1252
Huntley v Mathis	90 NC 101	1170
Huntley v McBrayer	172 NC 642	441
Hurst v Everett	91 NC 399	1280
Hurley v Ray	160 NC 376	1247
Hutchins v Bank	128 NC 72	402
Hutchinson v Smith	68 NC 354	934
Hyman v Gaskins	27 NC 267	1435
Ins Co v Tweed	7 Wall (US)	
	44	1080
Institute v Norwood	45 NC 65	721, 722
Jackson v Tel Co.	139 NC 347	486
James v RR	121 NC 423	348
Jamesville etc R Co v Fisher	109 NC 1	1282
Jenkins v Jarret	70 NC 255	1249
Jenkins v Lambeth	172 NC 466	1448
Jenkins v Wilkinson	107 NC 707	820
Jennings v Copeland	90 NC 572	748
Johnson v Armfield	130 NC 575	1384
Johnson v Ins Co.	157 NC 106	922, 924
Johnson v Lassiter	155 NC 47	1193
Jones v Britton	102 NC 166	951
Jones v Jones	80 NC 246	450
Jones v RR	150 NC 473	1048
Jones v Wilkesboro	150 NC 646	1074
Jordon v Coffield	70 NC 110	898
Joyner v Sugg	132 NC 580	832
Junge v MacKnight	137 NC 285	943
Kelly v Traction Co.	132 NC 368	1325
Kenny v RR	165 NC 99	770
Kerchner v MacRae	80 NC 219	750
Killian v RR	128 NC 261	10, 498
King v Bynum	137 NC 491	714
King v Fountain	126 NC 196	311
King v Hobbs	139 NC 170	727, 1221
King v Stokes	125 NC 514	524

TABLE OF CASES

xiii

Kiser v Combs	114 NC 640	1053
Kitchen v Pridgen	48 NC 62	983
Kitchen v Wood	154 NC 565	142, 1307
Knight v Foster	163 NC 329	988
Koonce v Butler	84 NC 221	939
Kohl v US	91 US 367	573
Krider v Ramsey	79 NC 354	434
Lain v Gaither	72 NC 234	63
Lane v Dudley	6 NC 119	1168
Landon v Wilmington etc R Co. .	88 NC 585	1435
Lassiter v RR	136 NC 89	1295
Latham v Spragins	162 NC 404	1253
Lbr Co v Cedar Co.	142 NC 411	917
Lbr Co v Triplett	151 NC 409	705
Lea v Utilities Co.	175 NC 459	1185
Ledford v Emerson	138 NC 502	1400
LeDuc v Butler	112 NC 458	101, 1010
LeDuc v Moore	111 NC 516	383
Lee v Oates	171 NC 717	1451
Lehew v Hewitt	138 NC 6	699, 1220
Leigh v Mfg Co.	132 NC 167	574
LeRoy v Jacobsky	136 NC 443	883
LeRoy v Steamboat Co.	165 NC 109	667
Lewark v RR	137 NC 383	491
Lewis v Blue	110 NC 430	55
Lewis, In re	88 NC 31	852
Lewis v Steamboat Co.	131 NC 652	700
Lineberger v Lineberger	143 NC 229	891
Lloyd v RR	166 NC 24	404
Lunn v Shermer	93 NC 164	785
Luxton v North River Bridge Co. .	147 US 337	338
Lynch v Melton	150 NC 595	1439
Magruder v Randolph	77 NC 79	970
Machine Co v McClamrock	152 NC 405	1262
Maggett v Roberts	112 NC 71	1026
Malloy v Fayetteville	122 NC 480	1299
Manrau v RR	223 US 9	767
Marable v RR	142 NC 557	116, 118, 1044
Marcom v RR	126 NC 200	1097
Markham v Markham	110 NC 356	1034
Maxwell v Houston	67 NC 305	63
May v Loomis	140 NC 350	785, 786
Mayho v Cotton	69 NC 289	834
McArthur v Johnson	61 NC 317	775
McCoy v Lassiter	95 NC 88	1161

McCracken & Adler	98 NC 400	830
McGehee v RR	147 NC 142	1096
McIlhenny v Wilmington	127 NC 146	453, 1066
McIver v Hardware Co.	144 NC 478	387
McKee v Angel	90 NC 60	937
McKimmon v Caulk	170 NC 54	546
McLamb v RR	122 NC 862	1084, 1090
McLawhorn v Harris	156 NC 107	669, 1322
McManus v RR	174 NC 735	1209
McNeill v Currie	117 NC 341	693
McPherson v Blacker	146 US 35	196
Medlin v Buford	115 NC 260	775, 776
Meekins v Newberry	101 NC 17	717
Mercer v RR	154 NC 399	1037
Metz v Asheville	150 NC 748	453, 1066
Mfg Co v Gray	124 NC 322	1260, 1270, 1271
Mfg Co v Mfg Co.	161 NC 430	716
Mial v Ellington	134 NC 131	1104, 1105
Miller v Bumgartner	109 NC 412	13
Mills v Duree	7 Cranch 484	171
Millsaps v Estes	137 NC 535	902
Mobley v Griffin	104 NC 112	21, 22, 24, 567, 1004
Moore v Horne	153 NC 413	484, 487, 918
Moore v RR	165 NC 439	1048
Moose v Carson	104 NC 431	25
Moose v Crowell	147 NC 551	298
Morton v Lbr Co.	152 NC 54	730
Morrison v Parks	164 NC 197	285
Motley v Warehouse Co.	122 NC 347	122
Mott v Comrs	126 NC 866	426
Mottu v Davis	151 NC 237	954
Mule Co v RR	160 NC 215	1083
Myatt v Myatt	149 NC 137	724
Myers v Lbr Co.	129 NC 252	1035
Newman v Bost	122 NC 524	813, 816
Newton v Clark	174 NC 393	1365
Newsome v Bunch	144 NC 15	852
Nicholson v Dover	145 NC 18	1181
Ober v Katzenstein	160 NC 439	352
Odom v Clark	146 NC 544	125, 1111
Ogden v Land Co.	146 NC 443	1214
Olmstead v Smith	133 NC 584	1279
Orr v Tel Co.	132 NC 691	1086
Osborn v Leach	133 NC 427	943

TABLE OF CASES

xv

Overman v Sasser	107 NC 432	771
Overton v Hinton	123 NC 1	558
Owings v Speed	5 Wheaton (US) 420	153
Pace v Pace	73 NC 119	300
Parish v Cedar Co.	133 NC 478	182
Parker v Banks	79 NC 480	1061
Parker v Morrill	98 NC 232	716
Parker v RR	123 NC 71	1396
Patterson v McIver	90 NC 493	60
Peace v Edwards	170 NC 64	1399
Pederson v RR	229 US 146	767
Peebles v Guano Co.	77 NC 233	1093
Peele v Powell	156 NC 553	804
Pennell v Robinson	164 NC 257	809
Perry v Hackney	142 NC 368	1447
Perry v Ins Co.	137 NC 402	725
Phillips v Tel Co.	130 NC 513	574
Picot v Armistead	37 NC 226	1230
Pierce v RR	124 NC 83	403, 405
Pigford v Grady	152 NC 179	1457
Pipe Co v Howland	111 NC 615	348
Porter v Armstrong	134 NC 447	678
Poston v Jones	122 NC 536	1056
Potter v Bonner	174 NC 20	523
Powell v Flowers	151 NC 140	1110
Poythress v RR	148 NC 391	120, 121
Price v Electric Co.	160 NC 450	879
Price v Price	133 NC 494	1420
Pritchard v Comrs	126 NC 904	1071
Pullen v Corporation Com.	152 NC 548	1310
Rains v RR	169 NC 189	765
Ramsey v Cheek	109 NC 270	996
Ramsbottom v RR	138 NC 38	1081
Range Co v Carter	118 NC 328	350
Ransom v McClees	64 NC 17	1139
Ray v Long	132 NC 891	866
Raymond v Newman	122 NC 52	1118
Rea v Rea	156 NC 529	877
Real Estate Co v Bland	152 NC 225	522
Redditt v Singer Mfg Co.	124 NC 100	405
Rudisill v Whitener	146 NC 403	1289
Reeves v Reeves	82 NC 348	16
Ried v King	158 NC 85	1115
Reitzel v Eckard	65 NC 673	556, 561

Reyburn v Sawyer	128 NC 8	1101
Reynolds v Magness	24 NC 26	720
Rhea v Craig	141 NC 602	719
Rhyne v Lipscombe	122 NC 650	426
Rich v Morisey	149 NC 37	1062, 1162
Richardson v Ins Co.	136 NC 314	1249
Richardson v Richardson	152 NC 705	1236, 1392
Riggsbee v Durham	94 NC 800	1300
Ritch v Oates	122 NC 631	1017
Roberson v Lbr Co.	154 NC 328	494
Roberts v Pratt	152 NC 731	954
Rodman v Robinson	134 NC 503	299
Rogerson v Houtz	174 NC 27	1037
Rose v Bryan	157 NC 173	807
Ross v Cotton Mills	140 NC 115	696
Rowe v Lbr Co.	138 NC 465	105, 1395
RR v Baird	164 NC 253	65
RR v Comrs	148 NC 220	1309, 1318
RR v Davis	19 NC 451	572
RR v Mfg Co.	166 NC 168	575
RR v Newton	133 NC 136	914, 1204
RR v Sturgeon	120 NC 225	576, 1207
Satterwhite v Gallagher	173 NC 525	862
Sandlin v Kearney	154 NC 596	1052
Savage v Davis	131 NC 159	1023
Schas v Ins Co.	166 NC 55	923
Scott v Ins Co.	137 NC 515	943
Settle v Settle	141 NC 553	756
Shankle v Ingram	133 NC 254	1007
Shannon v Lamb	126 NC 38	568
Shelton v Hampton	28 NC 216	1487
Sherrill v Sherrill	73 NC 8	681
Shernor v Spear	92 NC 148	805
Shields v Ins Co.	119 NC 380	341
Sims v RR	130 NC 556	1254
Sims v Ray	96 NC 87	851
Simmons v Morse	51 NC 6	992
Sinclair v McBryde	88 NC 438	16
Smathers v Bank	135 NC 410	376, 408
Smathers v Gilmer	126 NC 757	1266
Smith v Alabama	124 NC 465	136
Smith v Brisson	90 NC 284	641, 642
Smith v Brown	132 NC 365	800
Smith v French	141 NC 1	1279
Smith v Gudger	133 NC 627	131
Smith v Ingram	132 NC 959	439

TABLE OF CASES

xvii

Smith v Kron	96 NC 392	904, 905
Smith v Moore	149 NC 185	1488
Smith v Norfolk etc R Co.	145 NC 98	1091
Smith v Paul	133 NC 66	964
Smith v Proctor	139 NC 314	27
Smith v School Trustees	141 NC 143	258
Smith v Wiseman	41 NC 540	1457, 1458
Smith v Smith	63 NC 637	1413
Smithfield Imp Co v Coley-Barden ..	156 NC 255	987
Smithwick v Whitley	152 NC 366	1375
Smoak v Sockwell	152 NC 503	124
Soloman v Sewerage Co.	142 NC 439	35
Sprague v Comrs	165 NC 603	1068
Sprager v Moore	117 NC 449	1109, 1114
Springs v Hopkins	171 NC 486	511, 621, 1445
Spruill v Bateman	162 NC 588	1102, 1103
Stafford v Gallops	123 NC 19	934
Stafford v Harris	72 NC 198	19
Stanford v Grocery Co.	143 NC 419	1022
Staton v Webb	137 NC 35	245
Starnes v Hill	112 NC 1	524, 525
Straus v Sparrow	148 NC 309	1107, 1112
State v Austin	108 NC 780	469
State v Black	60 NC 262	850
State v Black	94 NC 809	812
State v Bohanan	142 NC 695	963
State v Boyett	32 NC 336	450
State v Brown	95 NC 685	570
State v Bryson	173 NC 803	455
State v Burchfield	149 NC 537	929
State v Collins	151 NC 648	679
State v Cox	28 NC 440	457
State v Craige	89 NC 475	990
State v Crisp	170 NC 785	841
State v Davenport	156 NC 596	990
State v Dowden	118 NC 1147	837
State v Dry	152 NC 813	466
State v Eason	114 NC 787	1395
State v Francis	157 NC 612	471, 472
State v Hall	142 NC 710	284, 419
State v Harris	145 NC 456	226, 895
State v Herron	175 NC 754	73
State v Hewitt	158 NC 627	445
State v Hunt	134 NC 684	836
State v Ice Co.	166 NC 366	138, 406
State v Kale	124 NC 816	452
State v Kennedy	169 NC 326	112

State v Laughter	159 NC 488	845, 847, 889, 890
State v Lewis	142 NC 626	151, 152, 215, 893
State v Little	178 NC 722	725
State v Long	143 NC 670	894
State v Matthews	142 NC 621	467, 849
State v Matthews	66 NC 106	725
State v Miller	100 NC 543	470
State v Moody	172 NC 972	1276
State v Moore	104 NC 714	189
State v Morris	104 NC 837	457
State v McDonald	133 NC 680	991
State v McNair	93 NC 628	448
State v McQueen	46 NC 177	1474
State v Nowell	156 NC 648	449
State v Oliver	70 NC 60	850
State v Patterson	134 NC 612	186
State v Payne	86 NC 609	1488
State v Perry	122 NC 1018	817, 818
State v Phifer	65 NC 321	762
State v Pitt	166 NC 268	1477
State v Potts	100 NC 457	451
State v Ray	151 NC 710	894
State v Rhodes	61 NC 453	850
State v Robins	28 NC 23	450
State v Ross	76 NC 242	1028
State v Rowe	155 NC 436	840
State v Seahorn	166 NC 373	449
State v Shuford	128 NC 588	1301
State v Thomason	46 NC 274	848
State v Upchurch	72 NC 146	965
State v Wallace	162 NC 622	461, 703
State v West	152 NC 832	459
State v Whitlock	149 NC 542	190
State v Williams	65 NC 398	449
State v Williams	146 NC 618	145, 161
State v Wright	75 NC 439	1474
State v Yeargin	117 NC 706	448
Stockton v Mining Co.	144 NC 595	941
Stout v Wrenn	8 NC 420	43, 454
Straus v Sparrow	148 NC 309	1107, 1112
Strother v RR	123 NC 197	1046
Sullivan v Field	118 NC 358	1187
Sumner v Miller	64 NC 688	16
Sumner v Statom	151 NC 198	1363
Supply Co v Machin	150 NC 738	1172
Supply Co v Person	154 NC 456	821
Sykes v Ins Co.	148 NC 13	729, 1224

TABLE OF CASES

xix

Tankard v Tankard	84 NC 286	1366
Tapp v Dibrell	134 NC 546	709
Tate v Powe	64 NC 644	16
Taylor v Taylor	108 NC 69	745
Taylor v Eatman	92 NC 601	806
Taylor v Taylor	112 NC 134	477
Tel Co v Tel Co.	90 US 9	164
Thompson v Crump	138 NC 32	553, 557, 1449
Thorpe, In re	150 NC 487	1419
Tiddy v Graves	126 NC 620	480, 881, 1442
Tillinghast v Cotton Mills	143 NC 268	1273
Tise v Whitaker-Harvey Co.	146 NC 374	499
Tobacco Co v Tobacco Co.	145 NC 367	351, 401
Tompkins v Dallas Cotton Mill	130 NC 347	489
Tomlinson v Bennett	145 NC 279	23
Townsend v Williams	117 NC 330	382
Tremaine v Williams	144 NC 114	519, 520, 569
Trinity College v Ins Co.	113 NC 244	925, 926
Trigg Co v Bucyrus Co.	104 Va. 79	57
Trust Co v Ins Co.	173 NC 558	920
Trust Co v Mason	151 NC 264	363
Turner v Comrs	127 NC 153	25
Underwood v Coburn Motor Car Co.	166 NC 458	1264
Unitype Co v Ashcraft	155 NC 63	773
University v Borden	132 NC 476	1455
US v Goodwin	7 Cranch (US) 108	31
Vann v Edwards	135 NC 661	877
Vester v Collins	101 NC 114	1424
Vick v Vick	126 NC 123	1379
Victor v Cotton Mills	148 NC 107	391
Vickers v Leigh	104 NC 248	618, 1019
Volivar v Cedar Works	152 NC 656	410
Waldroop v Waldroop	179 NC 674	131
Walker v Carpenter	144 NC 674	698
Walker v Mfg Co.	157 NC 131	1036
Walters v Lbr Co.	165 NC 388	1039, 1040
Ward v Sugg	113 NC 489	1376
Warren v Dail	170 NC 406	862, 883
Watson v Proximity Mfg Co.	147 NC 469	1185
Waynesville v Satterwait	136 NC 226	1302
Weatherbee v Farrar	97 NC 106	680
Webb v Atkinson	124 NC 447	708, 753
Webb v Borden	145 NC 188	1353

Weeks v Wilkins	168 NC 298	1166
Weil v Davis	139 NC 215	672
Well Co v Ice Co.	125 NC 80	1279
West v Grocery Co.	138 NC 166	711
West v RR	140 NC 620	869
Whigham v Hall	8 Ga App 509	1259
White v Comrs	90 NC 437	332
Whitefield v Garris	134 NC 24	626
Wiggins v Pender	132 NC 628	433, 435, 436, 437, 440
Wiggins v RR	154 NC 577	1037
Wilson v Ins Co.	155 NC 173	37
Wilson v Wiggins (NC)	87 SE 92	1273
Williams v Buchanan	23 NC 535	105
Williams v Lewis	158 NC 571	1190
Williams v RR	130 NC 116	1077
Williams v RR	128 NC 286	1041
Williams v Teachey	85 NC 402	1166
Williams v Washington	16 NC 137	1189
Winder v Kenan	161 NC 628	1377
Winslow v Norfolk Hdw Co.	147 NC 275	698
Wiscart v Dauchy	3 Dall (US) 321	31
Wolf v Davis	74 NC 597	939
Worlick v White	86 NC 139	782
Wood v Barber	90 NC 76	1375
Wood v Cherry	73 NC 110	1339
Wood v Kincaid	144 NC 393	1150
Woodard v Blue	103 NC 109	1474
Woody v Fountain	143 NC 66	110
Zimmerman v Robinson	114 NC 39	673, 674

INTRODUCTORY

1. **What is law?**

A. Law in its most general and comprehensive sense signifies a rule of action.—I Black 38.

2. **What is municipal law?**

A. Municipal law is a rule of civil conduct prescribed by the supreme power in a state commanding what is right and prohibiting what is wrong.—I Black 44.

3. **Is the constitution of North Carolina municipal law?**

A. Yes.—See Bouvier's Law Dict.

4. **What does the municipal law of North Carolina include?**

A. It includes the common law, the statute law and the constitution.—See I Black 44.

5. **What does the municipal law of England include?**

A. The common law, or *lex non scripta*, and the statute law, or *lex scripta*.—I Black 62.

6. **Define international law.**

A. International law is the law which regulates the intercourse of nations.—Black's Law Dict.

7. **From what source was the civil law derived, and how was it introduced into England?**

A. The civil law was derived from the old law of the Roman Empire, which was spread over the continent of Europe with the growth of the Catholic church, and from thence to England with the introduction of the Catholic faith there. Theobald, a Norman abbot, was particularly instrumental in bringing it into England.—I Black 18.

8. **What is meant by the sovereign or supreme power in a state?**

A. It is the highest authority in a state, all others being inferior thereto.—Black's Law Dict.

9. **What are the absolute rights of the individual?**

A. Personal security, personal liberty, and private property.—I Black 129.

ABATEMENT AND REVIVAL

10. What effect did the death of either party have at common law upon personal actions for tort?

A. The action abated.—Killian v RR 128 NC 261, 38 SE 873.

11. What actions for tort abate upon the death of one of the parties?

A. No action shall abate if the cause of action shall survive or continue.—Con Stat 461.

ACKNOWLEDGMENT

12. Does the statute law of North Carolina make a distinction between the manner of the execution and probate of a deed by a married woman and that of an unmarried woman, and if so, what is the distinction?

A. The private examination of an unmarried woman need not be taken, but it is necessary in the case of a married woman.—Con Stat 997.

13. Is the deed of a married woman without privy examination color of title?

A. Yes.—Miller v Bumgartner 109 NC 412, 13 SE 936.

ACTIONS

14. What remedies are provided by the code of Civil Procedure?

A. Actions and Special Proceedings.

15. When is an action said to be commenced against the defendant?

A. When summons is issued.—Con Stat 404.

16. Special proceedings.—“This phrase has been used by the New York and other codes of procedure as a generic term for all civil actions which are not ordinary actions.”—Black’s Law Dict.

An action is an ordinary proceedings in a court of justice by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment or prevention of a public offense.—Con Stat 392.

All other remedies are special proceedings.—Con Stat 393.

Any proceeding that under the old method was commenced by *capias ad respondendum* including ejectment or a bill in

equity for relief is a civil action. Any proceeding that under the old code might be commenced by petition or motion upon notice is a special proceeding.—*Tate v Powe* 64 NC 644.

However, actions and special proceedings do not include provisional and extraordinary remedies as will be seen hereafter.—See *Howerton v Tate* 66 NC 231. See *Mordecai's Remedies* Chaps 9 and 10.

Special proceedings include principally:

Petition for partition.—*Capps v Capps* 85 NC 408.

Proceedings to obtain damage.—*Sumner v Miller* 64 NC 688.

Proceedings for settlement of estate.—*Herring v Outlaw* 70 NC 334.

Petition to sell land to pay debts.—*Sinclair v McBryde* 88 NC 438.

Petition for alimony.—*Reeves v Reeves* 82 NC 348.

In a special proceeding summons must be issued and complaint filed as in any other form of action. The provisional and extraordinary remedies are for the most part judicial writs and decrees granting relief or establishing a right which could not be done by an ordinary action or special proceeding.

A provisional remedy is a remedy provided for present need or immediate occasion, adapted to meet a particular exigency, particularly a temporary process available to a plaintiff in a civil action which secures him against loss, irreparable injury, dissipation of the property, etc., while the action is pending.—*Black's Law Dict.*

The Provisional Remedies are:

Arrest and Bail.

Claim and Delivery.

Attachment.

Injunction.

Appointment of Receivers.—*Con Stat* 767.

The Extraordinary Remedies are:

Habeas Corpus.

Prohibition.

Mandamus.

Quo Warranto.

Injunction.

Bills of Peace and Quia Timet.

Bills of Interpleader.

Certiorari.

Recordari.

Scire Facias.—*Mordecai's Remedies* Chap 10.

17. How many provisional remedies, and what are they?

- A. 1. Arrest and Bail.
2. Claim and Delivery.
3. Injunction.
4. Attachment.
5. Appointment of Receivers.
Other provisional Remedies.—See Question 16.

18. In what courts must special proceedings be instituted?

- A. In the Superior Court.

19. In special proceedings when is it necessary for the decree to be approved by the judge?

- A. In all ex parte proceedings when the title to land is involved and petitioners are minors.—Con Stat 761.

20. Under what circumstances can an action be maintained to remove a cloud from title?

- A. Any person in possession or entitled to possession may bring an action against any other claiming any interest in the land adverse to the title of the person in possession to remove cloud from title. An existing judgment is considered such adverse claim.—Crockett v Bray 151 NC 615, 66 SE 666.

ADVERSE POSSESSION

21. What is title by adverse possession?

- A. It is title derived from possession adverse to the possession of all others for a period prescribed by statute.—Bond v Beverly 152 NC 56, 67 SE 55.

22. What possession is necessary to sustain it?

- A. The possession must be open, notorious, continuous and adverse.—Mobley v Griffin 104 NC 112, 10 SE 142.

23. Upon what principle can title by adverse possession be sustained?

- A. That there should be an end to litigation.—Tomlinson v Sellers 145 NC 279, 59 SE 37.

24. A conveys land to B and afterwards to C who takes possession thereof, title being out of the state. B then sues C for the possession. Can he recover? What is the rule in such cases?

- A. B cannot recover if C was a purchaser for value and had deed registered first, or if C can show open, notorious and

continuous adverse possession for seven years.—*Hooker v Nichols* 115 NC 157, 21 SE 207; *Mobley v Griffin* 104 NC 112, 10 SE 142.

25. Under the common law of this state, can title by adverse possession be acquired against a municipality by an individual in possession of land?

A. Cannot except as to lands over which municipality has power of alienation.—*Turner v Comrs* 127 NC 153, 37 SE 191. Cannot now as to streets, etc., under Con Stat 435, *Moose v Carson* 104 NC 431, 10 SE 689, decided prior to passing of Con Stat 435.

26. What kinds of property may be said to lie in prescription?

A. Incorporeal hereditaments.—II Black 264.

27. What is meant by color of title?

A. A paper writing (usually a deed) which purports and appears to pass title, but fails to do so.—*Smith v Proctor* 139 NC 314, 51 SE 889.

28. What is required to mature it into a good title?

A. Seven years possession under known and visible lines and boundaries.—Con Stat 428.

29. Is descents cast color of title?

A. Yes.—*Carter v Chilton* 175 NC 406, 95 SE 616.

APPEAL AND ERROR

30. How is the right to appeal to the State Supreme Court conferred in North Carolina?

A. By Constitution of North Carolina.—Art IV Sec 8.

31. What is the difference between appeal and writ of error?

A. Appeal is a process of civil law origin, and removes the cause entirely, subjecting the facts as well as the law to review and revisal. Writ of error is of common law origin, and removes nothing for examination but the law.—*Wiscart v Dauchy* 3 Dall (US) 321; *US v Goodwin* 7 Cranch (US) 108.

32. What is the difference between the grounds for a new trial and arrest of judgment?

A. Matters wholly extrinsic to the record are grounds for a new trial. Matters appearing on face of record are grounds for arrest of judgment.

33. What is the procedure prescribed for settling a case on appeal?

A. Notice of appeal, if not given on the trial, must be given within ten days. Appellant prepares his statement of the case showing facts sufficient to show his ground for exception; this is served on the appellee, who, if he agrees with the appellant, signs the same as case. If not, he makes up counter case or exceptions to case, and returns it, and then the judge who tried the case makes up the case on appeal.—Con Stat 642.

34. When will an appeal lie, under our statute, from an order or judgment and explain the difference between premature and fragmentary appeals?

A. An appeal may be taken from every judicial order or determination of a judge of a superior court upon or involving a matter of law or legal inference, whether made in or out of term, which affects a substantial right claimed in any action or proceeding; or which in effect determines the action, and prevents a judgment from which an appeal might be taken; or discontinues the action, or grants or refuses a new trial.

A premature appeal is one taken from a judgment not final. A fragmentary appeal is one wherein a portion only of the record has been carried to the higher court, or the entire record has been taken up in fragments.

35. If an appeal is taken from an order dissolving an injunction, does it keep the injunction in force pending the appeal? What is the effect if the appeal is taken from an order granting an injunction?

A. In the former case, it is not in force pending the appeal, but in the latter it remains in force.—Carter v White 134 NC 466, 46 SE 983; Solomon v Sewerage Co 142 NC 439, 55 SE 300.

36. In what class of cases has the Supreme Court of the United States the right to review the final judgment of the State courts of last resort, and how would you proceed to get the case before that Federal Tribunal?

A. Only Federal questions can be considered by the Supreme Court of the United States in reviewing a judgment of a State Court of last resort.—Cornell University v Fiske 136 US 152, 34 Law Ed 427.

Would proceed by writ of error.

37. An appeal is taken from a justice of the peace to the Superior Court, and it appears that the Superior Court has

original jurisdiction of the cause of action. No objection is made to the jurisdiction except in the Superior Court. What should be done by the court upon the objection being made?

A. The action should be dismissed, if justice of the peace had no jurisdiction.—Wilson v Ins Co 155 NC 173, 71 SE 79.

ARBITRATION AND AWARD

38. What is arbitration?

A. It is the means of redressing wrongs by the joint act of parties in which they submit all matters in controversy to parties chosen by them, called arbitrators.—III Black 16.

ARREST

39. May any arrest without warrant be lawfully made by an officer or an unofficial person, and, if so, under what circumstances?

A. Every person present at any riot, rout, affray or other breach of the peace, shall endeavor to suppress and prevent the same, and, if necessary for that purpose, shall arrest the offenders.

Every person in whose presence a felony has been committed may arrest the person whom he knows or has reasonable ground to believe to be guilty of such offence, and it shall be the duty of every sheriff, coroner, constable or officer of police, upon information, to assist in such arrest.

Every sheriff, coroner, constable, officer of police or other officer, entrusted with the care and preservation of the public peace, who shall know or have reasonable ground to believe that any felony has been committed, or that any dangerous wound has been given, and shall have reasonable ground to believe that any particular person is guilty, and shall apprehend that such person may escape if not immediately arrested, shall arrest him without warrant, and may summon all bystanders to aid in such arrest.—Con Stat 4542, et seq.

40. What is the purpose of arrest and bail?

A. To enforce the judgment upon the person if it cannot be enforced upon the property of the defendant.

41. When may the defendant be arrested in civil actions in North Carolina?

A. 1. In an action for the recovery of damages, on a cause of action not arising out of contract, where the defendant is

not a resident of the state, or is about to remove therefrom, or when an action is for an injury to person or character, or for injuring, or for wrongfully taking, detaining or converting property, real or personal.

2. In an action for a fine or penalty, or for seduction, or for money received, or for property embezzled or fraudulently misapplied by a public officer, or by an attorney, solicitor or counsellor, or by an officer or agent of a corporation or banking association, in the course of his employment as such, or by any factor, agent, broker, or other person in a fiduciary capacity, or for any misconduct or neglect in office, or in a professional employment.

3. In an action to recover the possession of personal property, unjustly detained, where the property, or any part thereof, has been concealed, removed, or disposed of, so that it cannot be found or taken by the sheriff, and with the intent that it should not be so found or taken, with the intent to deprive the plaintiff of the benefit thereof.

4. When the defendant has been guilty of a fraud in contracting the debt, or incurring the obligation for which the action is brought, or in concealing or disposing of the property for the taking, detention, or conversion of which the action is brought, or when the action is brought to recover damages for fraud or deceit.

5. When the defendant has removed, or disposed of his property, or is about to do so, with intent to defraud his creditors.—Con Stat 768.

ASSAULT AND BATTERY

42. A points an unloaded pistol at B in fun. Is A guilty of a violation of the law? If so, what is it?

A. Guilty of an assault.—Con Stat 4216.

43. Will consent justify one man in beating another, or relieve him from the civil or criminal liability otherwise attached thereto?

A. Consent relieves him of neither criminal nor civil responsibility.—Pollock on Torts 139; Stout v Wren 8 NC 420.

44. State the facts necessary to be proved to convict of secret assault.

A. Assault must be made with purpose unknown, maliciously, with deadly weapon, and with intent to kill.—Con Stat 4213.

ASSIGNMENTS

45. What is the provision of our state law as to the assignment of an ordinary business contract, and what defenses are permissible when an action is brought by the assignee?

A. Suit may be brought in the name of the assignee, but in non-negotiable instruments the assignment shall be without prejudice to any set-off or other defense existing at the time of, or before notice of, the assignment.—Con Stat 446.

46. What particular form of words is necessary to make a valid assignment of a chose in action?

A. None; any words indicating that a transfer is intended will be effectual.—Clark on Contracts 366.

47. If a note is assigned, what are the rights of the maker against the makee, dependent upon the time and circumstances of the assignment?

A. If assigned before maturity and without notice, holder takes it free from equities of maker; if after maturity or with notice of equities, holder takes subject to such equities.—Con Stat 3033.

ATTACHMENT

48. What is the object of attachment proceedings?

A. To take property of debtor into custody of law to satisfy claim of plaintiff.

49. What course would you take to attach a debt due to a defendant from a third party?

A. Apply for attachment in the usual form against the debtor, setting out the grounds for attachment against his creditor, and alleging that this debtor owed him.—Con Stat 818, 819.

50. A is the owner of a note against B, who is a non-resident but owns property in this state. How can A collect his debt?

A. By attachment.—Con Stat 798, et seq.

ATTORNEY AND CLIENT

51. For what acts and in what manner may an attorney be debarred in this state?

A. An attorney at law must be debarred and removed for the following causes by the superior court:

(a) Upon his being convicted of a crime punishable by imprisonment in the penitentiary.

(b) When any judgment is rendered against him for money collected by him as an attorney and retained by him without any **bona fide** claim thereto or to any part thereof.

An attorney at law may be debarred or suspended at the discretion of the court:

(a) Upon its being found by a jury that he has been guilty of any conduct in the practice of his profession involving wilful deceit or fraud.

(b) That he has by himself or another solicited professional business.

Proceedings for the disbarment or suspension of an attorney under this act shall be instituted and prosecuted only by the committee on grievances of the North Carolina Bar Association.—Con Stat 204 et seq.

52. Is counsel justified in bringing or defending a civil action, or in defending a criminal action, when he knows that under the laws and facts the judgment should be rendered against the client? Is there any distinction in these cases, and if so, what is it, and the reason therefor?

A. Yes. The lawyer, who refuses his professional assistance because in his judgment the case is indefensible, usurps the function of both judge and jury.

There is a distinction to be made between the case of prosecution and defense for crimes, between appearing for plaintiff in pursuit of an unjust claim, and the defendant in resisting what appears to be a just one.—Sharswood's Legal Ethics 84, 90.

53. In the case of professional communications between attorney and client, can the attorney be compelled to divulge them on the witness stand against his client?

A. Generally speaking, he cannot without consent of client. This rule, however, is subject to several exceptions laid down in *Hughes v Boone* 102 NC 137, 9 SE 286.

54. Give the qualification of the rule that an attorney cannot testify as to the communications made on the relationship without the consent of the client.

A. The statute provides that when fraud upon the state is charged such communications shall not be privileged.—Con Stat 1797.

55. Has an agent or attorney, employed to collect a note, authority to compromise or settle for less than the amount due in the absence of express authority from the owner of the note?

A. No.—*Lewis v Blue* 110 NC 420, 15 SE 196.

BAILMENT

56. What is a bailment? Give an illustration.

A. A bailment is a delivery of goods in trust upon a contract, express or implied, that the trust shall be faithfully executed on the part of the bailee, as if cloth be delivered, or in our legal dialect, bailed, to a tailor to make a suit of clothes.—II Black 451.

57. Wherein do bailments differ from sales and gifts of chattels?

A. In bailments the possession of the property and a special qualified property therein is in the bailee, while the right to recover possession remains in the bailor, but in sales or gifts the title passes from the donor or vendor to the donee or the vendee.—II Black 446-452; Trigg Co v Bucyrus Co 104 Va 79, 51 SE 174.

58. What is the distinction between a bailment and a trust?

A. In a bailment the legal title remains in the original owner, while in a trust the legal title is transferred to the trustee.

59. How many kinds of bailments are there at common law?

A. Bouvier gives three; for the benefit of bailor, for the benefit of bailee, and for the benefit of both.—Bouvier's Law Dict.

60. Into what three classes are bailments divided as regards the degree of care which the law requires to be exercised?

A. In bailments for the benefit of bailor—slight care.—Patterson v McIver 90 NC 493.

In bailments for the benefit of both—ordinary care.—Ashford v Pitman 160 NC 45, 75 SE 943.

In bailments for the benefit of bailee—extraordinary care.—Fortune v Harris 51 NC 532.

61. What bailees are held to be insurers?

A. Common carriers.—Everett v RR 138 NC 68, 50 SE 557.

62. What exceptions are made as to their obligations as insurers?

A. They are not liable for acts of God and public enemy.—Ibid.

63. Will long possession bar a bailor's right to recover?

A. No length of possession in the bailee will destroy the title or bar the action of the bailor.—*Darden v Allen* 12 NC 466; *Lane v Gaither* 72 NC 234; *Maxwell v Honston* 67 NC 305.

64. How can the bailee turn his possession into an adverse possession?

A. By some act changing the nature of the possession.—*Owen v Harris* 25 NC 210.

65. State if the bailee can maintain an action against a third person for an injury to the goods bailed?

A. Yes.—*RR v Baird* 164 NC 253, 80 NC 406.

BANKRUPTCY

66. What court has jurisdiction in proceedings in bankruptcy, and under what circumstances can one be thrown into bankruptcy?

A. The United States District Court in the several states, the Supreme Court in the District of Columbia, and the district courts of the several territories, and the Federal Court in the District of Alaska are made Courts of Bankruptcy.

Any person who owes debts except corporations is entitled to the benefits of the bankruptcy act as voluntary bankrupt. Any natural person except wage earners, or persons engaged chiefly in farming or tilling the soil, any unincorporated company, and corporation engaged chiefly in manufacturing, trading, publishing, printing or mercantile pursuits, owing debts to the amount of \$1,000.00 or over, may be adjudged an involuntary bankrupt, upon default of impartial trial and are subject to the provisions and are entitled to the benefits of the act.—20 Cyc 242, 281, 283.

67. In what body is the power to pass bankrupt laws vested?

A. "The power vested in Congress to enact national bankruptcy legislation arises from the provision of the constitution to the effect that Congress shall have power to establish uniform laws on the subject of bankruptcies throughout the United States."—US Const Art 2 Sec 8 Cl 4.

"Except so far as Congress shall exercise the power vested by the constitution and subject to the restriction that no state may pass a law impairing the obligation of contracts, each state may pass laws in the nature of bankruptcy acts operative within its territorial limits. The state laws have generally been

called insolvency laws while the federal acts passed in accordance with the constitutional provisions have been known as bankruptcy laws.”—5 Cyc 240.

68. Can a state pass a bankruptcy law which operates to discharge debtors resident therein from further liability on the surrender of all property owned by them? Give reason.

A. See Question 67.

BANKS AND BANKING

69. What relation does the cashier of a bank bear to the corporation?

A. He is agent of the bank and has general control over its financial affairs.—Bank v Taylor 122 NC 569, 29 SE 831.

70. Are the stockholders of a banking corporation, as individuals, liable for its debts?

A. They are liable in addition to their stock in an amount equal to their stock.—Con Stat 237.

71. What is the distinction between a general and special deposit?

A. “A general deposit (the ordinary form) is one which is to be repaid on demand, in whole or in part as called for, in any current money, not the same pieces of money deposited. In this case, the title to the money deposited passes to the bank, which becomes debtor to the depositor for the amount. A special deposit is one in which the depositor is entitled to the return of the identical thing deposited (gold, bullion, securities, etc.) and the title to the property remains in him, the deposit being usually made only for purposes of safe keeping.”—Black’s Law Dict.

72. Would a bank have a lien on a general deposit for the amount of a bill of exchange endorsed by depositor and discounted by the bank, and which was not matured?

A. Yes, if depositor is insolvent.—Hodgin v Bank 124 NC 540, 32 SE 887.

BIGAMY

73. A married man resident of this state goes to another state and obtains a decree of divorce, the summons being served by publication. He then returns to this state and marries again. Is he guilty of crime, and if so, of what crime? Give reason.

A. Guilty of bigamy. Divorce acquired in other state was a nullity.—State v Herron 175 NC 754, 94 SE 698.

BILLS AND NOTES

74. A and B sign a promissory note. Is it a joint or several contract?

A. A note by two or more makers may be either joint, or joint and several. A note signed by more than one person, and beginning "we promise," is joint only. A joint and several note usually expresses that the makers jointly and severally promise. But a note signed by more than one person, and beginning "I promise," is several as well as joint, and so also is one signed by two makers, and running "we or either of us promise to pay."—Daniel on Neg Inst See 94.

75. What are the requisites of a negotiable instrument under our statute?

- A. "1. It must be in writing and signed by the maker or drawer.
 "2. Must contain an unconditional promise or order to pay a sum certain in money.
 "3. Must be payable on demand or at a fixed or determinable future time.
 "4. Must be payable to the order of a specified person or to bearer.
 "5. Where the instrument is addressed to a drawee he must be named, or otherwise indicated therein with reasonable certainty."—Con Stat 2982.

76. What is the distinction between negotiable and non-negotiable paper?

A. "An instrument is called negotiable when the legal title to the instrument itself, and to the whole amount of money expressed upon its face, may be transferred from one to another by endorsement and delivery by the holder or by delivery only. If a bond or non-negotiable note be assigned, the assignee steps into the shoes of the assignor, and if the bond or note has been paid, or is subject to any counter-claim or set-off against the original maker, they attach to and inure to the benefit of whose hands it may fall."—Daniel on Neg Inst See 1.

77. Draw a negotiable note from B to A for \$100 due six months after date.

A. \$100.00 Raleigh, N. C., Jan. 1, 1920.

Six months after date I promise to pay to A or order
 One Hundred (\$100.00) Dollars. Value received with interest at 6% per annum. B. (Seal.)

78. When were promissory notes made negotiable as inland bills of exchange in North Carolina?

A. In 1762. Statute 3 and 4 Anne were re-enacted. This was amended in 1786.—*Campbell v McCormack* 90 NC 491.

79. What is a bill lading?

A. It is a paper given by a common carrier, upon receiving goods for shipment, and is both a receipt for the goods and a contract to carry them.—*Daniel on Neg Inst* Sec 1727.

80. What is a bill of exchange, and how are the several parties to it designated?

A. A bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to order or to bearer. The person who writes the bill is the drawer, the one to whom it is written is the drawee, and the one to whom it is payable is the payee.—*Con Stat* 3109.

81. What is a foreign bill of exchange?

A. One drawn on a person residing in a different state from that of the drawer.—*Con Stat* 3117.

82. What is the effect, if any, of including in a note or bill of exchange that it is payable out of a certain fund?

A. Does not destroy its negotiability.—*Con Stat* 2934.

83. What is the effect upon the negotiability of any instrument having the essential requirements, if it is not dated and omits to recite that it was given for value and fails to specify where it was drawn and where payable, is signed under seal, and specifies a particular kind of currency in which payment is to be made?

A. Does not destroy its negotiability.—*Con Stat* 2987.

84. Define a special endorsement and state how it affects an instrument payable to bearer or which has been indorsed in blank.

A. A special endorsement specifies the person to whom or to whose order the instrument is to be payable.—*Con Stat* 3015.

Where an instrument payable to bearer is indorsed specially, it may nevertheless be further negotiated by delivery; but the person indorsing specially is liable as endorser to only such holders as to make title through his endorsement.—*Con Stat* 3021.

85. Is the note in question 1133 negotiable? Give the reason.

A. Yes.—Con Stat 2982; See Question 75.

86. What is the effect of an endorsement in blank on a negotiable instrument?

A. It transfers the property of the payee therein, and makes it payable to bearer and makes payee liable as endorser.—Con Stat 3045.

87. Who is a holder in due course under our statute?

A. He is one who takes an instrument under the following conditions:

“1. That the instrument is complete and regular upon its face.

“2. That he became the holder of it before it was ever due, and without notice that it has been previously dishonored, if such was the fact.

“3. That he took it for good faith and value.

“4. That at the time it was negotiated to him he had no notice of any infirmity in the instrument, or defect in title of the person negotiating it.”—*Evans v Freeman* 142 NC 61, 54 SE 847; Con Stat 3033.

88. If a note is assigned, what are the rights of the maker against the makee, dependent upon the time and circumstances of the assignment?

A. If assigned before maturity and without notice, holder takes it free from equities of maker; if after maturity or with notice of equities, holder takes subject to such equities.—Con Stat 3033.

89. When is the burden upon the holder of a bill to show that he acquired it in due course?

A. When it is shown that the title of any person who has negotiated the bill is defective.—Con Stat 3040.

90. Is there any case in which the purchaser of a note, with knowledge of the equities between the original parties, will acquire title to it free from such equities?

A. He will acquire title to it free from such equities if he is a holder in due course.—Con Stat 3040.

91. Is the negotiability of an instrument affected by the endorsement “without recourse”?

A. No.—Con Stat 3019.

92. What are the rights of a holder under such endorsement who has purchased the paper before maturity, for value and without notice of any equity or other defense of the maker?

A. Holder has all rights of any holder in due course except as to endorsers.—Con Stat 3019.

93. Suppose A endorses to B a note against C for \$1,000 due in six months and receives for it from B \$900; how much can B recover of C, the maker? In case of default by C in the payment, how much can B recover of A, the endorser?

A. Could recover \$1,000 in either case, if he was a holder in due course.—See Question 87.

94. If a note is assigned, what are the rights of the maker against the holder depending upon the time and circumstances of the assignment?

A. If assigned before maturity and without notice, holder takes it free from equities of maker, but if after maturity or with notice of the equities, holder takes subject to such equities.—Con Stat 3033.

95. When is a bill of exchange considered as dishonored, and what steps must be taken to charge the drawer and endorsers?

A. It is dishonored when the drawee has refused or declined to accept it. Notice must be given to the drawer and each endorser.—Con Stat 3071.

96. What is an acceptance for honor or supra protest?

A. Where the drawee of a bill has refused to accept it, and the bill has been protested for non-acceptance, or where the bill has been protested for better security, a stranger to the bill, may, by the custom of merchants, intervene and accept the instrument for the honor of the drawer or of any one of the endorsers. Such an acceptance is called an acceptance for honor or supra protest.—Con Stat 3143.

97. Can a bill of exchange be accepted before it is drawn?

A. Yes.—Con Stat 3117.

98. What are the days of grace, and when is a bill of exchange entitled to the privilege?

A. Three days are allowed in North Carolina and in most states.

“When days of grace allowed: All bills of exchange payable within the state at sight, in which there is an express stipulation to that effect and not otherwise, shall be entitled to

days of grace as the same are allowed by the custom of merchants on foreign bills of exchange payable at the expiration of a certain period after date or sight, but no days of grace shall be allowed on any bill of exchange, promissory note, or draft payable on demand."—Con Stat 3067.

99. When is protest necessary, and what is then the effect of failure to protest?

A. Only in case of foreign bills of exchange for non-acceptance of non-payment. Failure to protest releases drawer and endorsers.—Con Stat 3134.

100. When must a check be presented for payment, and what is the effect of failure to present it at that time?

A. It must be presented within a reasonable time. Failure to do so releases drawer from liability thereon to the extent of the loss caused by the delay.—Con Stat 3168.

101. Will a part payment of a promissory note by a payee who has endorsed it stop the running of the statute of limitations as to the maker?

A. No.—LeDue v Butler 112 NC 458, 17 SE 428.

102. Do partial payments on such bills, bonds and promissory notes arrest the operation of the statute of limitations as to endorsers? If so, give the reason for the same.

A. "Payments made by the maker of a commercial paper will not repel the bar of the statute of limitations as to an endorser."—Houser v Fayssoux 168 NC 1, 83 SE 693.

BONDS

103. What is an obligation or bond, "Simplex obligatio"?

A. "A deed whereby the obligor obliges himself, his heirs, executors and administrators, to pay a certain sum of money to another at a day appointed."—II Black 340.

BOUNDARIES

104. Suppose a call in a deed is North 100 poles to Neuse River. Would the survey stop at 100 poles or go to Neuse River?

A. Would go to Neuse River. Natural objects and boundaries, if they can be located, will control. If they cannot be found, course and distance will control.—Echard v Johnson 126 NC 409, 35 SE 1036.

105. By what rule is the boundary of land determined where there is a call for a highway or unnavigable stream?

A. In a call for a highway or unnavigable stream, the center is meant. In navigable streams, the call means low water mark.—Rowe v Lbr Co 138 NC 465, 50 SE 848; Williams v Buchanan 23 NC 535.

106. A owns land on both sides of a non-navigable stream of water. He conveys the land on one side of the stream to B and on the other side of the stream to C, the stream being called for as a boundary. What is the legal term descriptive of the ownership of the stream with reference to B and C?

A. "Ad filum aqua." (To the thread of the water or to the middle of the stream.)

107. A owns land which is bounded on one side by a highway and on the other by a non-navigable stream and conveys it to B. Does the latter acquire any interest in the highway or in the stream and if the stream had been navigable, what would be his rights therein, at common law?

A. Questions 106, 1396.

108. Suppose a survey is made of a tract of land contemporaneously with the execution of the deed conveying it and a corner is marked and located at the time of the survey, differing from the corner described in the deed. Which corner will be adopted?

A. The corner marked and located by the surveyor.—Cherry v Slade 7 NC 82.

109. The state issues a grant to A for 100 acres of land. Thereafter a grant is issued to B for 100 acres which covers 30 acres of the first tract. What is the term descriptive of the 30 acres?

A. Lappage.—Currie v Gilchrist, 147 NC 648 (652), 61 SE 581.

110. What is a proceSSIONING proceeding, and what is its general effect, scope, and purpose? Does such proceeding always involve the title to the lands? If not, how may such title be put in issue in such proceeding?

A. It is a special proceeding to establish a boundary line which is in dispute, its purpose and effect being to bar any further litigation in regard to a particular boundary. A proceSSIONING proceeding may be begun by any owner of land whose boundary lines are in dispute.—Con Stat 361, 362, 366.

The question of title is not in issue in a proceeding for processioning for establishing a disputed line.—Hill v Dalton 140 NC 9, 52 SE 273.

Such title may be put in issue by the defendant's denying plaintiff's title.—Woody v Fountain 143 NC 66, 55 SE 425.

BROKERS

111. **What is the difference between a broker and a factor?**

A. A broker is one whose business it is to bring parties together to bargain, or to bargain for them in matters of trade, commerce or navigation.

A factor is one whose business it is to receive and sell goods for a commission. He is often called a commission merchant.

BURGLARY

112. **What are the degrees of burglary? Define and distinguish them.**

A. "There shall be two degrees of the crime of burglary as defined at common law. If the crime be committed in a dwelling house, or in any room used as a sleeping apartment in any building, and any person is in the actual occupation of any part of said dwelling house or sleeping apartment at the time of the commission of such crime, it shall be burglary in the first degree. If the said crime be committed in a dwelling house or sleeping apartment not actually occupied by anyone at the time of the commission of the crime, or if it be committed in any house within the curtilage of a dwelling house, or in any building not a dwelling house but in which is a room used as a sleeping apartment and not actually occupied as such at the time of the commission of said crime, it shall be burglary in the second degree."—Con Stat 4232.

CANCELLATION OF INSTRUMENTS

113. **What is the doctrine of rescission?**

A. The destruction or annulling of a contract by a court of equity.—Bouvier's Law Diet.

114. **What is the distinction, if any, between rescission and cancellation?**

A. Rescission is an equitable right on the part of one person to have a voidable instrument surrendered by another. Then cancellation, or the equitable remedy, is applied, and the instrument is made void.—See Bispham's Equity Sec 472; See Black's Law Diet.

CARRIERS

115. Define a common carrier.

A. A common carrier is one who, by virtue of his calling, and as a regular business, undertakes for hire to transport persons and commodities from place to place, offering his services to all such as may choose to employ him and pay his charges.—Black's Law Diet.

116. What is the general rule defining the liability of a common carrier?

A. A carrier of goods insures their safe delivery except as against the acts of God and public enemy. A carrier of passengers is not an insurer of safety, but is required to use that high degree of care for the safety of the passengers that a prudent man would use in view of the risk and nature of the business.—Marable v RR 142 NC 557 (561), 55 SE 355.

117. What is the common law presumption when goods entrusted to a common carrier are lost?

A. That the carrier was negligent.—Hinkle v RR 126 NC 932, 36 SE 348.

118. Can a common carrier relieve himself of his common law liability by contract?

A. Yes, except for loss or injury by negligence.—Marable v RR 142 NC 557 (562), 55 SE 355.

119. Where a railroad receives goods for shipment in the usual course of business, and while in its warehouse awaiting shipment the goods are destroyed by fire, is the railroad company liable to the owner for their value?

A. Yes.—Barry v RR 122 NC 1002, 30 SE 14.

120. Under the decisions of this court where goods are shipped by a common carrier, when does its liability as a common carrier end, and its liability as a warehouseman begin? What is the distinction between the two kinds of liability?

A. Its liability as a common carrier begins when the goods are received for shipment and ends when the goods are carried to destination and notice to consignee is given with reasonable time to remove the goods. After this, liability as a warehouseman exists until delivery.—Poythress v RR 148 NC 391, 61 SE 515.

121. If goods are carried to their destination and there stored by the common carrier in his warehouse, will he be liable for their destruction while stored?

A. Yes—Question 122; Poythress v RR 148 NC 391, 61 SE 515.

122. What is the difference between the liability of a common carrier and that of a warehouseman?

A. A common carrier insures safe delivery of goods except as against acts of God and public enemy. A warehouseman is only liable for injury resulting from want of care.—Motley v Warehouse Co 122 NC 347, 30 SE 3.

CHATTEL MORTGAGES

123. Where there is a mortgage on a farm, and also a chattel mortgage on the growing crops, and the farm is sold under the mortgage before the crop matures, which mortgagee is entitled to the growing crops?

A. The one having the mortgage on the growing crops.—Con Stat 2481.

124. A executes a mortgage on his horse and buggy to B and the mortgage is properly recorded. A sells to C and C sells to parties unknown and living beyond the borders of the state. Has B any remedy against C, and if so why?

A. Yes. The mortgage constitutes a valid lien against the mortgaged property. "The vendee of a mortgagor of mortgaged personal property has only the rights of the mortgagor. The mortgagee in possession is not a naked depositary, but has possession coupled with an interest, and is damaged by any unlawful conversion of the property to the extent of that interest; and can recover for such conversion against the mortgagor, or the mortgagor's vendee."—Smoak v Soekwell, 152 NC 503, 67 SE 904.

125. Can personal property be mortgaged and transferred by parol?

A. Yes.—Odom v Clark, 146 NC 544 (549), 60 SE 513.

CLAIM AND DELIVERY

126. When is claim and delivery used?

A. When plaintiff claims the title to personal property which is in the possession of another.—Con Stat 830.

127. If the owner sues the thief for the value of his horse which is stolen and obtains a judgment which he is unable to collect, can he afterwards recover the horse by claim and delivery?

A. No, because he has elected to waive the tort and sue on contract for money received to his use.—Clark on Contracts, 538; Cooley on Torts 91.

128. A mortgages his land to B and the mortgage is promptly recorded. Subsequently A cuts a lot of trees growing on the land and sells them to C without consent of B. Thereafter A defaults in the payment of the mortgage debt to B. B advertises and sells. D buys, paying the full amount of the mortgage debt, and takes possession and refuses to allow C to enter and take possession of the trees cut. Has C any remedy against D, and if so, what is it?

A. The trees having been severed from the realty are personal property and do not pass the lands sold under the mortgage. C may take claim and delivery of the cut trees.—27 Cyc 1246.

CLERKS OF COURTS

129. What is the jurisdiction of the clerk of the Superior Court?

A. Every clerk has power—

1. To issue subpoenas to compel the attendance of any witness residing or being in the state, or to compel the production of any bond or paper, material to any inquiry pending in his court.

2. To administer oaths and take acknowledgements, whenever necessary, in the exercise of the powers and duties of his office.

3. To issue commissions to take the testimony of any witness within or without this state.

4. To issue citations and orders to show cause to parties in all matters cognizable in his court, and to compel the appearance of such parties.

5. To enforce all lawful orders and decrees by execution or otherwise, against those who fail to comply therewith or to execute lawful process. Process may be issued by the clerk, to be executed in any county of the state, and to return before him.

6. To exemplify, under seal of his court, all transcripts of deeds, papers or proceedings therein, which shall be received in evidence in all the courts of the state.

7. To preserve order in his court and to punish contempts.
8. To adjourn any proceeding pending before him from time to time.

9. To open, vacate, modify, set aside or enter as of a former time, decrees or orders of his court, in the same manner as courts of general jurisdiction.

10. To enter judgment in any suit pending in his court in the following instances: judgment of voluntary nonsuit in any case where judgment is permitted by law; and judgment in any suit by consent of parties.

11. To award costs and disbursements as prescribed by law, to be paid personally, or out of the estate or fund, in any proceeding before him.

12. To compel the return to his office by each justice of the peace, on the expiration of the term of office of such justice, or if the justice be dead, by his personal representative of all records, papers, dockets and books held by such justice by virtue or color of his office and to deliver the same to the successor in office of such justice.

13. To take proof of deeds, bills of sale, official bonds, letters of attorney, or other instruments permitted or required by law to be registered.

14. To take proof of wills and grant letters testamentary and of administration.

15. To revoke letters testamentary and of administration.

16. To appoint and remove guardians of infants, idiots, inebriates and lunatics.

17. To audit the accounts of executors, administrators, collectors, receivers, commissioners and guardians.

18. To exercise jurisdiction conferred on him in every other case prescribed by law.—Con Stat 938.

130. When there is an appeal from the judgment of the clerk, to what is it taken, and is the appeal heard at chambers or at term?

A. To the judge of the superior court, either in term time or vacation.—Con Stat 633.

131. When an appeal is taken from the clerk in a matter of which he had no jurisdiction or jurisdiction only in part, or when by amendment matter is added of which the clerk would not have jurisdiction, what course may the judge take in his discretion?

A. May proceed as if cause had been instituted in Superior Court.—Smith v Gudger 133 NC 627, 45 SE 955; Waldroop v Waldroop 179 NC 674.

132. An appeal is taken from the clerk of the Superior Court and it appears that the Superior Court has original jurisdiction of the cause of action. No objection is made to the jurisdiction except in the Superior Court. What should be done by the court upon the objection being made there?

A. The Superior Court should proceed to hear and determine the case.—*In re Anderson* 132 NC 243, 43 SE 649; *Con Stat* 637.

COMMON LAW

133. What was the origin of the common law?

A. Strictly speaking, the origin of the common law is unknown, it having originated in immemorial usages and customs. The foundation of these customs is said to have been laid by the ancient Britons, and built upon by the Romans, Picts, Scots, Saxons and Normans. These usages, in the strict sense of the word, must have been used so long that "the memory of man runneth not to the contrary." They originated in particular customs, general customs and certain particular laws. Their origin was before the art of printing was known in England, but records of them are handed down to us—through the records of adjudicated cases, and by the writings of common law authors.—*I Black* 63, et seq.

134. To what extent has the common law been adopted in this state?

A. All such parts as are not inconsistent with the government of this state, or are not otherwise provided for by statute.—*Con Stat* 970.

135. What constitutes the common law of North Carolina, and where is it to be found?

A. The common law of England, which is to be found in the text books and the decisions of the courts.—*In re Bryan* 60 NC 42.

136. Does the *lex non scripta*, or common law, as distinguished from the great charter and statute law of England, form any part of the laws of the Federal Government?

A. Strictly speaking, it does not, as the jurisdiction of the United States Courts is based entirely upon the Constitution and upon statutes passed by Congress upon the authority of the Constitution.—See *Smith v Alabama* 124 US 478, 31 L Ed 512.

137. What is the common law doctrine as to the following of precedents?

A. Precedents are to be followed unless they are flatly absurd and unjust.—*I Black* 70.

CONSPIRACY

138. What is a criminal conspiracy?

A. A combination or confederacy between two or more persons formed for the purpose of committing, by their joint efforts, some unlawful or criminal act, or some act which is innocent within itself, but becomes unlawful when done by concerted action of the conspirators, or for the purpose of using criminal or unlawful means to the commission of an act not in itself unlawful.—Black's Law Dict.

CONSTITUTIONAL LAW

IN GENERAL, 139.

CONSTITUTIONALITY OF STATUTES, 145.

ENGLISH CONSTITUTION, 147.

CONSTITUTION OF UNITED STATES, 151.

In General, 151.

Article One, 155.

Article Two, 168.

Article Three, 169.

Article Four, 171.

Article Five, 175.

Article Six, 177.

Fourth Amendment, 180.

Fifth Amendment, 181.

Sixth Amendment, 183.

Tenth Amendment, 184.

Eleventh Amendment, 193.

Twelfth Amendment, 195.

Thirteenth Amendment, 197.

Fourteenth Amendment, 199.

Sixteenth Amendment, 209.

Eighteenth Amendment, 211.

Nineteenth Amendment, 212.

CONSTITUTION OF NORTH CAROLINA, 213.

Article One, 219.

Article Two, 239.

Article Four, 245.

Article Six, 251.

Article Seven, 255.

Article Eight, 263.

Article Ten, 266.

Article Thirteen, 267.

IN GENERAL.

139. What instruments constitute the fundamental laws of this state?

A. The Constitution of the United States and the Constitution of North Carolina.

140. What is the difference between the constitution of Great Britain and the constitution in force in this country?

A. The constitution of Great Britain is not written and the one of this country is.

141. In case of conflict between the laws and ordinances of the state and constitution, and the laws of the United States, what court or courts may authoritatively and finally determine the question?

A. Either the Supreme Court of the United States or the State Supreme Court, the Supreme Court of the United States being the final arbiter.

142. When may a constitutional provision be said to be self-executing?

A. When it is complete within itself, and needs no legislation to give it effect, and no special means for its enforcement. —Kitchen v Wood 154 NC 565.

143. Name and define the three co-ordinate branches of government.

A. Legislative, Judicial and Executive. The Legislative department makes the laws, the Judicial interprets the laws, and the Executive enforces them.

144. Does a mere grant of a power to congress imply a prohibition upon the states to exercise the like power, and when is a power vested in congress exclusive of all state action on the same subject?

A. "The granting of a particular power to the United States in the federal constitution does not necessarily prohibit the states, by implication, from exercising the same power. But in all cases of conflict, or where the exercise by the states of powers so granted would defeat the purpose for which they have been granted to the federal government, the grant is an implied prohibition to the states to exercise the same powers."—8 Cyc 773.

CONSTITUTIONALITY OF STATUTES.

145. Have the courts the power to declare an act of Congress or of the general assembly unconstitutional? If so, from what source do they derive the power, and by what rule should it be exercised?

A. The judiciary possesses the power to declare laws contrary to the constitution void, as a necessary power inherent in this office. Whenever it is clear that the legislature has transcended its authority and that an act of the legislature is in conflict with the constitution, it is imperatively required of the Court to declare the act inoperative and void. The presumption is in favor of the constitutionality of a statute until its violation of the constitution is proved beyond a reasonable doubt.—See *Bayard v Singleton* 1 NC 5; *State v Williams* 146 NC 618, 61 SE 61.

146. In the exercise of this power is there any difference in the rule of construction in dealing with an act of Congress and when dealing with an act of the General Assembly? If so, what is it, and why?

A. The Constitution of the United States is a grant of powers; the state constitution is a restriction of powers. So in an act of Congress the question is, whether Congress had any power to pass the act, while in the legislature the question is, whether the legislature is forbidden by the constitution to pass the act.—*Hall's Constitutional Law*, Sec 27; *State v Lewis* 142 NC 626 (631), 55 SE 600.

ENGLISH CONSTITUTION.

147. What fundamental statutes are generally regarded as the basis of the Constitution of England?

A. Magna Carta King John, 1215
 Confirmatio Cartarum Edward I, 1297
 Petition of Right Car I, 1629
 Habeas Corpus Act Car II, 1679
 Bill of Rights W. & M., 1688
 Act of Settlement William III, 1690
 —I Black 127.

148. By what instrument was the right of personal liberty first guaranteed to the people of England, and by what writ is it enforced?

A. Magna Carta first guaranteed to the people of England the right of personal liberty, which right was enforced by the writ of Habeas Corpus.—I Black 127, 128.

149. Was the jury system known and in force at the time of Magna Carta? What did the words there "*Judicium suorum parium*" refer to?

A. The mode of trial by jury was adopted soon after the conquest of England by William the Conqueror, and was finally established for the trial of civil suits by the time of the reign of Henry II, about fifty years before Magna Carta.

"*Judicium suorum parium*" (the judgment of our peers) refers to the mode of trial by jury.—See Bouvier's Law Dict.

150. Are the acts of the English Parliament ever unconstitutional?

A. Strictly speaking, they are not, as the English have no written constitution.

CONSTITUTION OF THE UNITED STATES.

In General.

151. State generally the difference between the powers conferred by the Constitution of the United States, and those conferred by the Constitution of North Carolina.

A. The Constitution of the United States is a grant of powers, while the state constitution is a limitation of powers.—State v Lewis 142 NC 626 (631), 55 SE 600.

152. Is the constitution of the United States a grant of powers or a restriction of powers? How is it with the state constitution?

A. The United States Constitution is a grant of powers, and, generally speaking, the state constitution is a restriction of powers.—State v Lewis 142 NC 626 (631), 55 SE 600.

153. When and by what body was the Constitution of the United States framed and how did the same become authoritative as the organic law of the Federal Government?

A. In 1787, by the Constitutional Convention, and became authoritative upon ratification by the States in Convention called for that purpose.—Owings v Speed 5 Wheaten (US) 420.

154. When was the Constitution of the United States adopted?

A. On Sept. 17, 1787. The Constitution went into legal operation on March 4, 1789. Rhode Island, the last of the thirteen original colonies to ratify, ratified the Constitution in May, 1790. North Carolina ratified in November, 1789.—Flander's Const of the US 46, 47.

Article I.

155. From what source does Congress derive its power to legislate?

A. From the Constitution of the United States.—Art I Sec I.

156. Can a bill for raising revenue originate in either house of Congress?

A. All bills for raising revenue must originate in the House of Representatives.—Art I Sec 7.

157. After a bill has passed the House of Representatives and the Senate, what then remains to be done before it may become a law?

A. To receive the approval of the President, or to await ten days for approval by him. If not vetoed within that time, it becomes a law unless Congress adjourns.—Art I Sec 7.

158. If the legislature passes an act impairing the obligation of contracts what is the result?

A. It is unconstitutional and void.—Art I Sec 10.

159. Does the constitution of this state contain any provision prohibiting the legislature from passing an act impairing the obligation of contracts? If so, quote the provision.

A. None. It is forbidden by Art I Sec 10 of the Constitution of the United States.

160. What was the purport of the "Dartmouth College" decision?

A. "In the great and celebrated case of Dartmouth College v Woodward, 4 Wheat 518, the inhibition upon the states, to impair by law the obligation of contracts, received the most elaborate discussion, and the most efficient and instructive application.

The arguments of the Supreme Court in this celebrated case contains one of the most full and elaborate expositions of the constitutional sanctity of contracts to be met with in any of the reports.

The decision in this case did more than any other single act, proceeding from the authority of the United States, to throw an impregnable barrier around all rights and franchises derived from the grant of the government; and to give solidity and inviolability to the literary, charitable, religious and commercial institutions of our country."—I Kent's Com 415-418.

161. Can the legislature, as a general rule, change the remedy by which the rights are enforced, and the rules of evidence and make the act applicable to causes of action which have arisen before the passage of the act? If so, why?

A. Yes. But this power is restricted by the constitution, which provides that the obligation of contracts cannot be impaired, and in criminal actions conviction cannot be provided for on less evidence.—*State v Williams* 146 NC 618, 61 SE 61.

162. What is an ex post facto law?

A. A law passed after the occurrence of an act, or commission of an act which retrospectively changes the legal consequences or relations of such act or deed.

It is a retrospective law which makes an act criminal which was not criminal when the act was done or changes the form of punishment or prescribes a heavier punishment than the law annexed when the act was done, or changes the legal rules of evidence so that a different form of, or less evidence is required to convict than was required at the time the act was done.—*Black's Law Dict.*

163. On what provision of the Federal Constitution is the act known as the Sherman act claimed to rest? And give the terms of the constitutional provision.

A. "Congress shall have the power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."—Art I Sec 8 Cl 3.

164. What is included in the term "Commerce" as used in the constitutional provision conferring on Congress the power to regulate commerce with foreign nations and among the several states and Indian tribes?

A. Commercial intercourses between nations and parts of nations in all its branches, whether on land or water, and including communications by telegraph, etc.—*Gibbons v Ogden* 9 Wheat (US) 193; *Tel Co v Tel Co* 90 US 9.

165. Suppose a corporation is engaged in interstate commerce, will it be protected by Congress as to such commerce, from encroachment upon its rights by the states under Art I Sec 8 of the Federal Constitution?

A. Yes.—See *Robbins v Shelby Co Taxing Dist* 120 US 493, 30 L Ed 694.

166. To what extent may a state regulate commerce?

A. Only so far as it is strictly intrastate. Congress has

the power to regulate commerce with foreign nations, and among the several states and with the Indian tribes.—Art I Sec 8 Cl 3.

167. What is a retroactive law, and is such a law enacted by Congress or state legislature valid, and if so, to what extent?

A. It is a law that applies to matters already passed. It is valid if it does not impair the obligation of contracts.—Anderson v Wilkins 142 NC 154, 55 SE 272.

Article II.

168. What is the Constitutional provision with reference to making treaties between the United States and foreign states or countries?

A. The president shall have power by and with the advice and consent of the senate to make treaties provided two-thirds of the senators present concur.—Art II Sec 2.

Article III.

169. Where is the judicial power of the United States vested under the Constitution?

A. The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as Congress may from time to time ordain and establish.—Art III Sec 1.

170. Is there any express provision of the Constitution of the United States which confers upon the courts authority to declare any act of Congress invalid, or is this an inference drawn by the courts? If there is any express provision of the Constitution conferring this power, quote it.

A. The judicial power of the United States shall be vested in one Supreme Court, etc. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made or which shall be made, under their authority, etc.

Whether an act of Congress is within the limits of its delegated power or not is a judicial question, to be decided by the courts, the Constitution having, in express terms, declared that the judicial power shall extend to all cases arising under the Constitution.—Gordon v US (1864) 117 US 705.

Article IV.

171. What is the substance of the full faith and credit clause of the Constitution of the United States and explain its meaning and effect upon the States?

A. "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state."—Art IV Sec 1.

It operates to give judgments, public acts or records of each state, the same validity, credit and effect in every other state as in the state of their origin.—See *Mills v Duryee* 7 Cranch 484, 3 L Ed 411; *Hampton v McConnell* 3 Wheat 235, 4 L Ed 378.

172. **How far, if at all, is the “full faith and credit” clause of the Constitution applicable to decrees for divorce?**

A. The court must give full faith and credit to a judgment of a court of a sister state granting within its jurisdiction a divorce in a suit between citizens of the state and within the jurisdiction of the court.—*Ex parte Alderman* 157 NC 507, 73 SE 126.

173. **Is the State of North Carolina obliged to accord to a citizen of another state the same privileges and immunities given to her own citizens? From what is this right derived?**

A. The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.—Art IV Sec 5.

174. **Are corporations regarded as citizens within the meaning of Art IV Sec 2 of the Federal Constitution, and, as such, entitled to the privileges and immunities of citizens of the several states?**

A. No.—*Paul v Virginia* 8 Wall 168, 19 L Ed 357.

Article V.

175. **What provision is contained in the Constitution of the United States as to its amendments?**

A. Amendments may be proposed by two-thirds of both houses, or upon application of the legislatures of two-thirds of the states. Congress shall call a convention to propose amendments. Amendments in both cases must be ratified by the legislatures of three-fourths of the states.—Art V.

176. **Is there any restriction on the power of amendment contained in the United States Constitution?**

A. No amendment prior to 1808 shall affect the first and fourth clauses in the ninth section of article one.

No state shall be deprived of its equal suffrage.—Art V.

Article VI.

177. **Please quote as accurately as you can the provision of the United States Constitution which makes that constitution and the laws in pursuance thereof and treaties supreme over any action of the state.**

A. “This Constitution and the laws of the United States which shall be made in pursuance thereof; and all treaties

made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of the state to the contrary notwithstanding."—Art VI.

178. What is the provision of the Federal Constitution as to the supremacy of the Constitution and laws of the United States?

A. "This Constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."—Art VI.

179. Can the United States by treaty with a foreign country make, control or regulate the acquisition or tenure of land by aliens within the boundaries of a given state, and in contravention of the laws of such state?

A. Yes.—Art VI.

Fourth Amendment.

180. Give the substance of the provision of the Constitution of the United States in reference to issuing warrants, and as to searches and seizures.

A. "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."—Amend Art IV.

Fifth Amendment.

181. What does the Fifth Amendment to the Constitution of the United States provide as to due process of law?

A. No person shall be deprived of life, liberty or property without due process of law.—Amend Art V.

182. What is meant by "due process of law?"

A. "Due process of law" and "the law of the land" mean the same thing. It is difficult to define what "due process of law" is but perhaps the definition most largely quoted is that of Mr. Webster in his argument of the Dartmouth College cases, which is as follows: "By the law of the land is

most clearly intended the general law, a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial.”—*Parish v Cedar Co* 183 NC 478 (484), 45 SE 768.

Sixth Amendment.

183. State the substance of the Sixth Amendment to the Federal Constitution in relation to criminal prosecutions.

A. “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crimes shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.”—Amend Art VI.

Tenth Amendment.

184. Under the Federal Constitution as originally framed, was there any power conferred upon the Federal Government to obstruct or interfere with unusual or oppressive legislation by a state concerning its own citizens?

A. No.—*Southerland’s Notes on Constitution* 576.

185. Does such power now exist, and if so, when was it conferred, and what is the provision concerning it?

A. Yes. Conferred by Amend Art XIV (1868). “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.”—Amend Art XIV.

186. At what session of Congress were the first ten amendments framed and submitted for ratification, and do the limitations and restrictions thereby established affect the action of the Federal or State government?

A. First Congress 1789. They affect Federal Government more than state.—*State v Patterson* 134 NC 612 (618), 47 SE 808.

187. Were the first ten amendments to the United States Constitution adopted at the same time or on different occa-

sions? And was there any previous understanding that they were to be adopted and for what reason? Give the circumstances.

A. The first ten amendments were submitted to the several states by a joint resolution of Congress, adopted on September 25th, 1789, under a preamble reciting: "The convention of a number of the states having at the time of their adoption of the Constitution expressed a desire in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added; and as extending the ground of public confidence in the government will best insure the beneficent ends of its institutions."—I US Stat at L 97. They were ratified by the following states, and the notifications of ratification by the governors thereof were successively communicated by the President to Congress: New Jersey, November 20th, 1789; Maryland, December 19th, 1789; North Carolina, December 22nd, 1789, etc.

188. Where do the powers remain that are not delegated to the Federal Government by the Federal Constitution?

A. In the states.—Amend Art X.

189. What is meant by the police power of a state?

A. It is the authority of the legislature to enact all such wholesome and reasonable laws as are not in conflict with the constitution of the state or United States, as it may deem conducive to the public good.—State v Moore 104 NC 714 (717), 10 SE 143.

190. What are its limitations?

A. If regulations are unreasonable or unnecessary they cannot be enforced.—State v Whitlock 149 NC 543, 64 SE 123.

191. In which department of the government is it vested, and by which department are its limitations finally defined and fixed?

A. It is vested in legislative, and its limitations are defined and fixed by judicial department.—Ibid.

192. Does the power to confer the privilege of voting belong to the state or to the United States?

A. To the state.—Amend Art X; NC Const Art VI Sec 1.

Eleventh Amendment.

193. What does the Eleventh Amendment to the Constitution of the United States provide, and what noted case was the cause or occasion of its being adopted?

A. That a state cannot be sued by a citizen of another state or of a foreign country. The case was *Chisholm v Ga* 2 Dall (US) 419.

194. May an action at law or a suit in equity be commenced or prosecuted against any one of the United States by a citizen of another state?

A. "The judicial power of the United States shall not be construed to extend to any suit in law or in equity, commenced or prosecuted against any one of the United States by a citizen of another state, or by citizens or subjects of any foreign state."—Amend Art XI.

Twelfth Amendment.

195. What change in the method of electing the President and Vice-President of the United States was established by the Twelfth Amendment, and what notable controversy was the occasion for the change?

A. Electors were to cast their votes for both President and a Vice-President instead of the second highest candidate for President being Vice-President. The election of Thomas Jefferson over Aaron Burr was the cause of the change.—Amend Art XII.

196. The Constitution of the United States empowers the State legislatures to prescribe the method of appointing presidential electors. Can the power thus delegated to the state legislatures by the Federal Constitution be abridged by any provision in the State Constitution, or is the authority conferred by the Federal Constitution paramount?

A. Congress is empowered to determine the time of choosing the electors and the day on which they are to give their votes, which is required to be on the same day throughout the United States, but otherwise the power and jurisdiction of the state is exclusive with the exception of the provisions as to the number of electors and the ineligibility of certain persons, so framed that congressional and federal influence might be excluded.—*McPherson v Blacker* (1902) 146 US 35 affirming (1892) 92 Mich 377.

Thirteenth Amendment.

197. What amendments to the Constitution of the United States were adopted since the Civil War, with the design and purpose of making secure its results? State in a general way the scope and purpose of each.

A. The Thirteenth, Fourteenth and Fifteenth. The Thirteenth was to prevent slavery and involuntary servitude.

Fourteenth was to prevent the states from making distinction as to the rights of persons under the law. Fifteenth was to prevent denying the right to vote on account of race, color, etc.

198. President Lincoln having made proclamation declaring the slaves free, and the results of the war having made such proclamations presently effective, why was the Thirteenth Amendment considered necessary?

A. To prevent the establishment of slavery in the future.

Fourteenth Amendment.

199. What important provision was made by the XIV Amendment in reference to the citizenship of persons born or naturalized in the United States and do the limitations therein established affect the action of the state or Federal Government?

A. That they are citizens of the United States and of the state wherein they reside.

It affects the action of the state government declaring that no state shall deprive any person of life, liberty or property, without due process of law, nor deny to any person the equal protection of the laws.

200. Under the Federal Constitution as originally framed, was there any power conferred upon the Federal Government to obstruct or interfere with unusual or oppressive legislation by a state concerning its own citizens?

A. No.—Southerland's Notes on Constitution, 576.

201. Does such power now exist, and if so, when was it conferred, and what is the provision concerning it?

A. Yes. Conferred by Amendment Art XIV (1868). "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."—Amend Art XIV.

202. What important provision was made by the Fourteenth Amendment to the Constitution as to persons born or naturalized within the United States and subject to its jurisdiction in reference to their citizenship and do the limitations established by the first section of said amendment affect the action of the state or Federal Government?

A. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United

States, nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. It affects the state government.

203. Prior to the adoption of the Fourteenth Amendment of the Federal Constitution, had Congress, or the Federal Courts, as a rule, any rights with the interference with the operation and effect of the state legislature in reference to its own citizens?

A. No.

204. What limitations are placed upon the states by the Fourteenth Amendment to the Constitution?

A. "No state shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.—Amend Art XIV Sec 1.

205. Does the Fourteenth Amendment to the Federal Constitution abridge the police power of the states?

A. No.—In re Converse 137 US 632, 34 L Ed 796.

206. What are the provisions of the Federal Constitution as to due process of law in its Fourteenth Amendment?

A. "Nor shall any state deprive any person of life, liberty or property without due process of law."—Amend Art XIV..

207. Does the mere grant of a power to Congress imply a prohibition upon the states to exercise the like power, and when is a power vested in Congress exclusive of all state action on the same subject?

A. "The granting of particular power to the United States in the Federal Constitution does not necessarily prohibit the states, by implication, from exercising the same powers. But in all cases of conflict, or where the exercise by the states of powers so granted would defeat the purpose for which they have been granted to the Federal Government, the grant is an implied prohibition to the states to exercise the same powers."—8 Cyc 773.

208. Define the term "citizenship" as the term is used in the Federal Constitution.

A. "All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States, and of the state wherein they reside."—Amend Art XIV Sec 1.

Sixteenth Amendment.

209. **What is the purport of the Sixteenth and Seventeenth Amendments to the Constitution of the United States?**

A. These two amendments are given below in full:

Article XVI.

"The Congress shall have power to levy and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration."

Article XVII.

"The Senate of the United States shall be composed of two senators from each state, elected by the people thereof, for six years, and each senator shall have one vote. The electors in each state shall have the qualifications requisite for electors of the most numerous branch of the State Legislatures.

"When vacancies happen in the representation of any state in the Senate, the executive authority of such state shall issue writs of election to fill such vacancies; provided, that the legislature of any state may empower the executive authority thereof to make temporary appointment until the people fill the vacancies by election as the legislatures may direct.

"This amendment shall not be so construed as to effect the election or term of any Senator chosen before it becomes valid as a part of the Constitution."

210. **What method was pursued in their adoption?**

A. The Sixteenth Amendment was submitted to the legislatures of the several states, there being then forty-eight states, by a resolution of Congress passed on July 12, 1909, at the first session of the sixty-first Congress, and was declared a part of the Constitution by a proclamation of the Secretary of State dated February 25, 1913.

The Seventeenth Amendment was submitted to the legislatures of the several states by a resolution of Congress passed May 6, 1912, at the second session of the sixty-second Congress, and was declared a part of the Constitution by a proclamation of the Secretary of State, May 31, 1913.

Eighteenth Amendment.

211. **What is the Eighteenth Amendment to the Constitution of the United States?**

A. "Sec. 1. After one year from the ratification of this article the manufacture, sale or transportation of intoxicating

liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

“Sec. 2. The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation.”

Nineteenth Amendment.

212. What is the Nineteenth Amendment to the Constitution of the United States?

A. “The right to vote shall not be denied or abridged by the United States or any state on account of sex.”

CONSTITUTION OF NORTH CAROLINA.

213. Who made and established the Constitution of North Carolina, and how may it be amended?

A. By convention assembled for that purpose first in 1777. Established by ratification by vote of the people.

214. Define the Constitution of this state.

A. It is a body of rules and maxims in accordance with which the powers of sovereignty are habitually exercised.—Cooley’s Constitutional Law 21.

215. Is the state constitution one of limitation of or granted power as to the legislative department? How is this as to the executive and judicial department?

A. Limitation as to the legislative department, granted as to the executive and judicial departments.—State v Lewis 142 NC 626 (631), 55 SE 600.

216. When was the first constitution adopted in North Carolina? Give the most important changes from time to time up to the convention of 1868.

A. First adopted in 1776. In 1835 instead of one senator from each county the state was divided into fifty districts, according to the taxes paid, and one senator elected from each. Instead of two representatives from each county and one from certain towns, the whole number was fixed at one hundred and twenty and each county had one, and the others distributed according to population. Provision was also made for the election of a governor every two years, also for impeachment of officers. In 1856 an amendment was made allowing every free white man, etc., to vote for senators, abolishing the requirement to be a freeholder. In 1868, practically a new constitution was adopted.—Herndon v Ins Co 111 NC 384, 16 SE 465.

217. **The Constitution of North Carolina is a limitation of power as to the legislative department, and a grant as to the executive and judicial. Why is this?**

A. All power not granted is reserved to the people and the legislature representing the people would have all the power except such as is granted to national government, were it not limited by the constitution, and the executive and judicial departments would have no power unless granted to them.

218. **How and when was the present State Constitution framed and how did the same become authoritative as the organic law of the State?**

A. By a convention which assembled at Raleigh on January 14th, 1868. It was ratified by an election held on April 24th, of the same year.—Connor and Cheshires Constitution of North Carolina. Introduction page 35.

Article I.

219. **To what government does a citizen of this state owe paramount allegiance?**

A. To the government of the United States.—Art I Sec 5.

220. **By what constitutional guaranty are their civil and religious liberties secured to the people of North Carolina?**

A. By the bill of rights as contained in the Constitution, Art I.

221. **What great principle does the second section of the Declaration of Rights of the Constitution of North Carolina set forth?**

A. "That all political power is vested in, and derived from, the people; all government of right originates from the people, is founded upon their will only, and is instituted solely for the good of the whole."—Art I Sec 2.

222. **What are the three divisions into which the State Constitution divides the powers of the government? Are either of these supreme over the others, or is all political power vested in the supremacy and the supervision of the people themselves, and based upon their will only? Quote the provisions of the Constitution (Art I Secs 2 and 37) stating the fundamental principle.**

A. "The legislative, executive and supreme judicial powers of the government ought to be forever separate and distinct from each other."—Art I Sec 8.

"That all political power is vested in, and derived from, the

people; all government of right originated from the people, is founded upon their will only, and is instituted solely for the good of the whole.”—Art I Sec 2.

“This enumeration of rights shall not be construed to impair or deny others retained by the people; and all powers not herein delegated remain with the people.”—Art I Sec 37.

223. Does the constitution of this state contain express declaration that the constitution and laws of the state are subordinate to the constitution and laws of the United States? If so, give the part where contained, and the wording as well as remembered.

A. “That every citizen of this state owes paramount allegiance to the Constitution and Government of the United States, and that no law or ordinance of the state in contravention or subversion thereof can have any binding force.”—Art I Sec 5.

224. What provision is there in the constitution of this state as to separate emoluments and privileges?

A. “No man, or set of men, are entitled to exclusive or separate emoluments or privileges from a community, but in consideration of public services.”—Art I Sec 7.

225. What rights are secured to the citizens by the Constitution of North Carolina when charged with the violation of the criminal law?

A. “In all criminal prosecutions, every man has the right to be informed of the accusation against him and confront the accusers and witnesses with other testimony, and to have counsel for his defence, and not be compelled to give evidence against himself, or to pay costs, jail fees, or necessary witness fees of the defence, unless found guilty.”—Art I Sec II.

226. What is the limitation of our state constitution on the power of the legislature as to the form of a bill of indictment?

A. “Every man has the right to be informed of the accusation against him.”—Art I Sec 11; *State v Harris* 145 NC 456, 59 SE 115.

227. What is the constitutional provision limiting the power of the courts with reference to “bail,” “fines” and “punishments?”

A. “Excessive bail should not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted.”—Art I Sec 14.

228. What is the provision of our state constitution especially affording protection for the citizens against oppressive and unusual interference by government with the rights of persons and property, and in what language is it expressed?

A. "No person ought to be taken, imprisoned or dessiezed from his freehold, liberties or privileges, or outlawed or exiled, or in any manner deprived of his life, liberty or property, but by the law of the land."—Art I Sec 17.

229. Define personal liberty with its limitations, as secured by the guarantees of the constitution.

A. Personal liberty is the independence of our actions of all will other than our own.—Bouvier's Law Dict.

230. What is the provision of the state constitution in respect to persons restrained of their liberty and what remedy may be invoked in such case?

A. "Every person restrained of his liberty is entitled to a remedy to enquire into the lawfulness thereof, and to remove the same, if unlawful; and such remedy ought not to be denied or delayed." The remedy is by writ of habeas corpus.—Art I Sec 18.

231. What says the constitution of this state as to the freedom of the press?

A. "The freedom of the press is one of the great bulwarks of liberty, and therefore ought never to be restrained, but every individual shall be held responsible for the abuse of the same."—Art I Sec 20.

232. What says the constitution of this state as to the ancient mode of trial by jury?

A. "In all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and ought to remain sacred and inviolable."—Art I Sec 19.

233. What does the constitution say as to perpetuities?

A. "Perpetuities and monopolies are contrary to the genius of a free state, and ought not to be allowed."—Art I Sec 31.

234. What is the provision of our constitution as to ex post facto laws?

A. No ex post facto law ought to be made.—Art I Sec 32.

235. By what fundamental principles are the courts controlled in the interpretation of the constitution?

A. "This enumeration of rights shall not be construed to impair or deny others restrained by the people; and all powers, not herein delegated, remain with the people."—Art I Sec 37.

236. From what source does the legislature of North Carolina derive its authority to legislate?

A. From the people.—Art I Sec 37.

237. What says the constitution of this state as to the powers that remain with the people?

A. All powers not herein delegated remain with the people.—Art I Sec 37.

238. By what rule or principle are grants of powers to the government construed as against the citizen?

A. So as not to impair or deny those retained by the people.—Art I Sec 37.

Article II.

239. How are the powers granted by the people to the government in the state constitution divided, and in which of the several departments is each power vested?

A. These powers are granted to the government through the executive, legislative, and judicial departments. The executive powers are vested in the governor with the other executive officers. The power to make the laws is vested in the legislative department. The judicial powers are vested in the Court for the trial of impeachments, a Supreme Court, Superior Court, Courts of Justices of the Peace, and such other courts inferior to the Supreme Court as may be established by law.—Arts II, III, IV.

240. In North Carolina, how many members are there in the senate and how many in the house of representatives?

A. The legislature is composed of fifty senators, and one hundred and twenty representatives.—Art II Secs 3 and 5.

241. What are the qualifications required of the members of the general assembly, and who passes upon them?

A. "Each member of the senate shall not be less than twenty-five years of age, shall have resided in the state as a citizen two years, and shall have usually resided in the district for which he is chosen, one year immediately preceding his election."—Art 11 Sec 7.

“Each member of the House of Representatives shall be a qualified elector of the state and shall have resided in the county for which he was chosen for one year immediately preceding his election.”—Art II Sec 8.

Each house passes upon the qualification and election of its members.—Art II Sec 22.

242. Are there any acts of assembly which requires more to be shown than certificates of ratification of the speakers? If so, what further is required and in what cases?

A. Bills authorizing the levying of taxes must pass their different readings on three separate days and the roll must be called and the yeas and nays recorded on the journal on the second and third readings. These formalities must be complied with in each house.—Art II Sec 14.

243. What is the provision of the Constitution of this state as to the distinction between actions at law and suits in equity?

A. The distinction is abolished.—Art IV Sec 1.

244. In what classes of legislation has the governor power to veto an act of the legislature?

A. The governor has no veto power.

Article IV.

245. By what instrument and when was the distinction between actions at law and suits in equity abolished in North Carolina?

A. By the constitution of 1868.—Staton v Webb 137 NC 35 (38), 49 SE 55.

246. Where is the judicial power of this state vested under the constitution?

A. See Question 239.

247. What are the powers of the Supreme Court?

A. It has jurisdiction, on appeal, to review matters of law or of legal inference from courts below, and the same jurisdiction of issues of fact and questions of fact exercised by it before 1868, and has power to issue any remedial writs necessary to give it supervision over the inferior courts. It has original jurisdiction in the case of claims against the state.—Art IV Secs 8 and 9.

248. Prior to 1868 there were numerous forms of action and

jurisdiction was divided into actions at law and suits in equity. What provision was substituted for this by the Constitution of that year? Quote it as accurately as you can.

A. "The distinctions between actions at law and suits in equity and the forms of all such actions and suits shall be abolished and there shall be in this state but one form of action for the enforcement or protection of private rights, or the redress of private wrongs, which shall be denominated a civil action."—Art IV Sec 1.

249. Can a citizen sue the state, and if so, where is the jurisdiction and what is the procedure?

A. "The supreme court shall have original jurisdiction to hear claims against the state, but its decision shall be merely recommendatory; no process in the nature of execution shall issue thereon; they shall be reported to the next session of the general assembly for its action."—Art IV Sec 9.

250. In what cases does the constitution guarantee a right of trial by jury, and in what cases may it be waived?

A. In all criminal and civil cases, the right of a trial by a jury is guaranteed, except the legislature may provide other means for the trial of petty misdemeanors, with the right of appeal.—Art I Secs 13 and 19.

"In all issues of fact joined in any court, the parties may waive the right to have the same determined by a jury, in which case the finding of the judge upon the facts shall have the force and effect of a verdict by a jury."—Art IV Sec 13.

Article VI.

251. What is the purport of the Suffrage Amendment to the State Constitution adopted in 1900, and why is it provided therein that if any part of the amendment should be held unconstitutional the whole should be invalid?

A. "Every person presenting himself for registration shall be able to read and write any section of the Constitution in the English language; and before he shall be entitled to vote he shall have paid on or before the first day of May of the year in which he proposes to vote his poll tax for the previous year, as prescribed by Article V section 1 of the Constitution. But no male person who was, on January 1, 1867, or any time prior thereto, entitled to vote under the laws of any state in the United States wherein he then resided, and no lineal descendant of any such person shall be denied the right to register and vote at any election in this state by reason of his failure to possess the educational qualifications herein prescribed:

Provided, he shall be registered in accordance with the terms of this section prior to December 1, 1908." And section 5 was inserted so that if the "Grandfather Clause" should be declared unconstitutional, the burdensome sections would be abrogated from all electors.—Art VI Sec 4.

252. Under the provisions of the above amendment to the Constitution in 1900, is any illiterate person of either race entitled to vote unless registered prior to 1st December, 1908?

A. No.

253. What are the only disqualifications for office named in the State Constitution?

A. "The following classes of persons shall be disqualified for office: First, all persons who shall deny the being of Almighty God. Second, all persons who shall have been convicted or confessed their guilt on indictment pending, and whether sentenced or not or under judgment suspended, of any treason or felony, or of any other crime, for which the punishment may be imprisonment in the penitentiary, since becoming citizens of the United States, or of corruption or malpractice in office, unless such person shall be restored to the rights of citizenship in a manner prescribed by law."—Art VI Sec 8.

254. In the provision of the State Constitution concerning the qualifications for office it is specified that "every voter" is eligible to office (thus prohibiting the Legislature to disqualify any voter) or does the provision prohibit any one to hold an office "unless he is a voter?" Give the exact language of the Constitution on this point and not your own construction of its effect.

A. "Every voter in North Carolina, except as in this Article disqualified, shall be eligible to office, but before entering upon the duties of the office he shall take and subscribe the following oath:

"I ————— do solemnly swear (or affirm) that I will support and maintain the Constitution and laws of North Carolina, not inconsistent therewith, and that I will faithfully discharge the duties of my office, as ————. So help me God."—Art VI Sec 7.

Article VII.

255. Under the state constitution, has the legislature power to create special districts for governmental purposes, apart

from the original political subdivisions of the state, such as counties, towns, etc.? If so, give some instances of a valid exercise of the power.

A. Yes. School districts.—*Hollowell v Borden* 148 NC 255, 61 SE 638; *Ellis v Trustees* 156 NC 10 (13), 72 SE 2.

256. Under our state constitution, where is the control of and administration of county affairs usually and primarily vested? What article of the constitution contains the regulations concerning it?

A. The county commissioners and other county officers.—Art VII.

257. Can the provisions of this article be modified or changed by legislative enactment, and if so, what is the limit of the legislative power in this respect?

A. The legislature may change, modify or abrogate any of the provisions of this article except that no municipal corporation may contract any debt or collect any tax except for necessary expenses, except by a vote of the majority of the qualified voters thereof (Sec 7), and that all taxes shall be uniform and ad valorem (Sec 9), and no municipal corporation may pay any debt incurred in aid or support of the rebellion (Sec 13).—Art VII.

258. If the article in question can be altered or modified by the legislature, must the act to that effect be general in its operation throughout the State, or will a local act be a valid exercise of the power?

A. Local act will be valid exercise of power.—*Smith v School Trustees* 141 NC 143, 53 SE 524.

259. What classification of corporations is recognized by our constitution?

A. Municipal and those other than municipal.—Arts VII and VIII.

260. Where is the power to create them vested?

A. In the legislature.—Arts VII and VIII.

261. Is there a special provision made as to amendments in relation to county or other like municipal governments?

A. Yes.—See Art VII Sec 14.

262. What are the powers of the general assembly under the Constitution of North Carolina in respect to amending or repealing the charters of corporations? And does it make any difference if the charter was granted prior to 1868?

A. This question was given prior to 1916 amendment to Art VIII Sec 1 of the constitution which withdraws from the Legislature the power to create a corporation, or to extend, alter or amend its charters by special act.—Board of Education v Comrs 174 NC 47, 93 SE 383; See Question 346.

Article VIII.

263. Define the term "Corporation" as it is used in the constitution of North Carolina.

A. All associations and joint stock companies having any of the power and privileges of corporations not possessed by individuals and partnerships.—Art VIII Sec 3.

264. What says the constitution of this state as to how corporations other than municipal shall sue and be sued?

A. "And all corporations shall have the right to sue, and be subject to be sued in all courts, in like cases as natural persons."—Art VIII Sec 3.

265. Does the power to confer the privilege of voting belong to the state or to the United States?

A. To the state.—US Const Amend Art X; NC Const Art VI Sec 1.

Article X.

266. What is the homestead under the constitution?

A. Real property to the value of \$1,000.—Art X Sec 2.

Article XIII.

267. By what methods may a convention of the people be called?

A. Two-thirds of each house of the general assembly may pass a resolution calling for a convention. This must be submitted to the qualified voters of the whole state at the next general election. Should a majority of such votes be cast in favor of such convention, it shall assemble on the day prescribed.—Art XIII Sec 1.

268. By what methods may the constitution be amended?

A. "No part of the Constitution of this State shall be altered, unless a bill to alter the same shall have been agreed to by three-fifths of each House of the General Assembly, and

the amendment or amendments so agreed to shall be submitted at the next general election to the qualified voters of the whole State, in such manner as may be prescribed by law, and in the event of their adoption by a majority of the votes cast, such amendment or amendments shall become a part of the Constitution of this State."—Art XIII Sec 2.

CONTRACTS

REQUISITES AND VALIDITY 280.

Nature and Essentials in General, 280.

Parties and Acceptance, 283.

Consideration, 292.

Legality of Object, 302.

CONSTRUCTION AND OPERATION, 312.

269. What is a contract?

A. A contract is an agreement upon sufficient consideration to do or not to do some particular thing.—II Black 442.

270. What are the essential elements of a contract?

- A. 1. Offer and acceptance.
2. Form required by law.
3. Consideration.
4. Competent parties.
5. Genuineness of consent.
6. Legality of object.—Clark on Contracts, 12.

271. Into what three classes are contracts divided?

- A. Simple contracts.
- Contracts under seal.
- Contracts of record.—See Clark on Contracts 47.

272. What is the difference between contracts and torts? Give an instance of each.

A. A contract is an agreement upon sufficient consideration to do or not to do some particular thing, while a tort is a right of action arising out of some act done or some duty neglected by the defendant by which plaintiff is injured. Example: A sells B a horse for \$500. This is a contract. By fraudulent representations of A, B is induced to buy the horse which he afterwards discovers to be worthless. This fraudulent act of A gives B a right of action in tort.—See Clark on Contracts 8.

273. What are executed and what are executory contracts?

A. Executed contracts are such as are performed at the time they are made; executory contracts are such as impose an obligation to do or not to do something in the future.—Clark on Contracts 1.

274. What is a unilateral and what is a bilateral contract? Give an example of each.

A. A unilateral contract imposes an obligation upon but one side only, the consideration on the other side having been executed, as where A buys and pays for timber to be cut within a certain time. In this case the seller is bound to permit removal, but the buyer is not bound to remove.

A bilateral contract is one in which there are reciprocal promises so that there is something to be done or forborn on both sides. A agrees to saw lumber for B at a certain price, and B agrees to pay the price. Both are bound, thus creating a bilateral contract.—*Winders v Kenan* 161 NC 628, 77 SE 687.

275. Define quasi or constructive contracts.

A. They are obligations created by law, to which there is no consent of the party bound but a fictitious promise is created by law, as in the case of a judgment.—Clark on Contracts 530.

276. What is the difference between a void and a voidable contract? Give instances of each.

A. A void contract is of no effect, while a voidable contract may be affirmed or disaffirmed at the option of one of the parties. A contract to do an unlawful act would be void. A contract by an infant to sell land is voidable.—Clark on Contracts 10.

277. If A writes to B proposing to sell him one hundred bales of cotton, each weighing five hundred pounds, at ten cents per pound, to be delivered November first, 1915, and B replies that he will take fifty bales at the price mentioned, is there a contract? Give reason.

A. No.—See Question 285.

278. A agrees to sell, and B to buy, a certain tract of land known as the Mackintosh Place. There are two such places. A has in mind one of them and B the other. Is there any contract between the parties? Give reason.

A. No, because there is not a meeting of the minds of the two people in one and the same intention.—Clark on Contracts 195.

279. What benefit is there in having a contract reduced to writing when the law does not require that it should be in writing to make it valid?

A. None, except to make its terms more certain.

REQUISITES AND VALIDITY.

Nature and Essentials in General.

280. Is an action to recover a penalty in contract or in tort? Give the reason.

A. In contract. A penalty is an amount recoverable for failure to perform a statutory duty, and all duties imposed by law raise an implied promise of performance.—Hodges v RR 105 NC 170, 10 SE 917.

281. A invites B to take dinner with him and B accepts. Is this a contract? Give reason.

A. Yes. All the essential elements of a contract are present, presuming the parties are competent to contract; an offer by A which is accepted by B; a mutual consideration passing from one to the other.—See Questions 269, 270.

282. What contracts are required to be registered?

A. All conveyances, or contracts to convey land, or interests therein for a greater period than three years; all mortgages and deeds of trust; all chattel mortgages, conditional sales of personal property, agricultural liens, marriage settlements, deeds of gifts, powers of attorney, etc., must be registered.—Con Stat 990.

Parties and Acceptance.

283. Is a contract made by a man too drunk to know what he is about void or only voidable?

A. Voidable.—Clark on Contracts 186.

284. What executory contracts made in the lifetime of the decedent terminate at his death, and what do not?

A. Contracts which have for their object the rendering of personal services are discharged by the death of the promisor. All others are not.—Clark on Contracts 476.

285. How must the offer be accepted, and the acceptance communicated before there is a binding contract?

A. "The acceptance must be (a) absolute and unconditional, (b) identical with the terms of the offer, (c) in the mode, at the place and within the time expressly or impliedly required by the offer."—Morrison v Parks, 164 NC 197, 80 SE 85.

286. In a written offer, by mail, what is required in the reply to make a binding agreement and when does the same take effect?

A. An acceptance in accordance with the terms of the offer. Takes effect at time acceptance is posted.—Questions 285, 291.

287. Suppose an offer is made by letter and is accepted by letter. When is the contract complete?

A. Contract is complete at the time acceptance is mailed.—Clark on Contracts 27; 9 Cyc 297.

288. If a letter withdrawing the offer is mailed, but not received, before the letter of acceptance is mailed, is there a contract? Give reason.

A. No. There is no contract until there is an offer which has been accepted. Acceptance takes place at the time of mailing of letter of acceptance, and in this case offer is withdrawn by posting letter of withdrawal before posting letter of acceptance.—9 Cyc 297.

289. A mails a letter to B accepting the latter's offer to sell him goods and then changing his mind, he declines the offer by telegraph, the telegram being received before the letter. Can A be held to the contract? State the reason for your answer.

A. Yes. The contract was binding on both parties from the time of posting the letter of acceptance.—Clark on Contracts 27.

290. A offers by letter to sell B a horse for \$100 payable January first, 1914, and B replies that he will accept the horse but that he can not pay before February first, 1914. A refused to deliver the horse. Can B maintain an action to recover it? Give reason.

A. No.—See Question 285.

291. A mails an offer to B to sell him certain goods at a fixed price, asking for a reply by return mail. B accepts the offer by the next mail, as directed, but his acceptance is never delivered to A. Is there a binding contract? Would it differ if B had replied by wire instead of by mail? Give reason.

A. There is a binding contract, as an acceptance by mail is an acceptance from the time the letter is posted. If the acceptance had been made by wire instead of by mail there would not be a binding contract, as the acceptance must be in the mode required by the offer.—Clark on Contracts 27.

Consideration.

292. What is meant by the consideration of a contract, and what are the different kinds of consideration?

A. "Consideration is that which moves from the promisee to the promisor, at the express or implied request of the latter, in return for his promise."—Clark on Contracts 106.

293. What is meant by the term "nudum pactum," and what is the legal force of an agreement to which it may be applied?

A. It means (naked agreement) an agreement without consideration, and is not enforceable at law.—Clark on Contracts 110.

294. What does the common law recognize as a consideration capable of supporting a simple contract?

A. "It may consist either in some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility, suffered, or undertaken by the other."—Clark on Contracts 106.

295. How do specialty contracts, those under seal, differ from simple contracts, with respect to the consideration?

A. "The chief characteristics of a deed or contract under seal, are that

(a) The recitals are conclusive against the parties. They are said to be estopped thereby.

(b) It merges a prior simple contract.

(c) A right of action is not barred until the lapse of a longer time than in case of simple contract.

(d) No consideration is necessary."—Clark on Contracts 57.

296. What kind of consideration is necessary to support a simple contract?

A. A valuable consideration is essential to the validity of every simple contract.—Clark on Contracts 110.

297. What is the rule with respect to negotiable instruments?

A. Consideration is presumed.—Clark on Contracts 110.

298. When is and when is not, a total want of consideration a perfect defense to an action upon a contract?

A. Total want of consideration is a perfect defense to an action upon a simple contract, but a contract under seal imports consideration.—II Black 445; Heptinstall v Rue 75 NC 78; Moore v Crowell 147 NC 551, 61 SE 524.

299. **A, for a nominal consideration, agrees to convey valuable property to B. Can the latter recover in an action for a breach of the contract?**

A. Yes, if the agreement to convey is based upon nominal consideration, but the conveyance on proper consideration.—*Rodman v Robinson* 134 NC 503, 47 SE 19.

300. **Can a contract under seal be impeached for want of consideration?**

A. In law, no. In equity, yes.—*Pace v Pace* 73 NC 119 (125).

301. **What is duress in law sufficient to avoid a contract?**

A. That degree of constraint or danger either actually inflicted or threatened and impending, which is sufficient in severity or apprehension, to overcome the mind and will of a person of ordinary firmness.—*Clark on Contracts* 240.

Legality of Object, etc.

302. **When is a contract illegal at common law?**

A. "The agreements which are illegal because they are in breach of the common law are:

- (a) Agreements involving the commission of a crime; and
 - (b) Agreements involving the commission of a civil wrong."
- Clark on Contracts* 256.

303. **When is a contract illegal in North Carolina?**

A. When it "contravenes some settled principle of public policy or is based upon an immoral consideration or entered into to accomplish an unlawful or immoral purpose."—*Engine Co v Paschel* 151 NC 27, 65 SE 523.

304. **Give six instances where a contract is void against public policy.**

- A.
1. Agreements tending to injure public service.
 2. Agreements tending to corrupt private citizens with reference to public matters.
 3. Those tending to obstruct or pervert public justice.
 4. Those tending to encourage litigation.
 5. Those of immoral tendency.
 6. Gambling contracts.
 7. Those in derogation of marriage.
 8. Those in restraint of trade.
 9. Exemptions from liability for negligence.—*Clark on Contracts* 254.

305. When is a contract in restraint of trade valid?

A. When it is not unreasonable, it not being unreasonable when based on valuable consideration, and is reasonably necessary to protect the interests of the party in whose favor it is made and does not usually prejudice the interests of the public, or is not in violation of a statute making it invalid.—Clark on Contracts 305 et seq; *Bradshaw v Millikin* 173 NC 432, 92 SE 161.

306. At common law were contracts by way of wagering or gambling lawful?

A. Yes.—*Gooch v Faucette* 122 NC 270 (274), 29 SE 362.

307. What contracts in restraint of marriage are void?

A. Restrictions on marriage are contrary to public policy, and therefore agreements or conditions creating or involving a restraint of marriage are void.—Clark on Contracts 302.

308. What is the effect if the agreement or consideration of a contract be illegal only in part?

A. It is usually void. Where distinct promises are based on distinct considerations, both of which are legal, they are valid, other parts of the contract being void.—See Clark on Contracts 321.

309. What agreements in restraint of marriage are void?

A. As a general rule, agreements in restraint of marriage are void.—Clark on Contracts 302.

310. If A should contract with the president of a national bank to buy shares of stock on the condition that the purchaser be made an officer of the bank, is the contract enforceable?

A. No, as it is against public policy.—Clark on Contracts 282; *Bridgers v Bank* 152 NC 293, 67 SE 770.

311. A being engaged in conducting a large mercantile business sells out to B and agrees in writing not to engage in such business within five years in the same town. Is such contract enforceable by B and how would you go about enforcing it?

A. Contract enforceable. B may bring suit for damages against A and may ask for injunction, requiring A not to violate terms of agreement.—*King v Fountain* 126 NC 196, 35 SE 427.

CONSTRUCTION AND OPERATION.

312. **What is the difference between the existence and construction of a contract, and by whom are they respectively determined?**

A. The existence of a contract is a fact to be found by the jury, while the construction of a contract is a declaration of its meaning by the Court.—See Clark on Contracts 386.

313. **What effect have custom and usage upon the interpretation of contracts?**

A. "A particular or general custom or usage may be proven to vary the usual meaning of the language of a contract, or to import a term not expressed therein."—9 Cyc 582.

314. **Define what is known as an independent contractor?**

A. "An independent contractor is one who undertakes to produce a given result, but so that in the actual execution of the work, he is not under the orders or control of the person for whom he does it, and who uses his own discretion in things not specified."—Denny v Burlington 155 NC 33 (37), 70 SE 1085.

315. **What is meant by the "lex loci contractus?"**

A. The law of the place of the contract.—25 Cyc 219.

316. **What laws govern the validity of a contract?**

A. The rights of the parties to contract are governed by the laws of the State in which the contract is made, or the **lex loci contractus**, but the remedy is controlled by the law of the state in which the suit is brought, or the **lex fori**.—Clark on Contracts 342.

317. **What if a contract is to be performed in a place other than that where it is made?**

A. The validity of a contract is in general to be determined by the law of the place where it is made. If valid there it is valid everywhere, but if invalid there it cannot be enforced in another state.—Cannaday v RR 143 NC 439, 55 SE 836.

318. **Are there any exceptions to the rule that a contract which is valid where it is made is valid everywhere?**

A. Yes.—See Clark on Contracts 344.

319. **A and B enter into a contract in Virginia which is**

lawful under the laws of Virginia but which is condemned by the statute of North Carolina. Can A recover upon the contract in North Carolina? Give the reason.

A. No.—See Question 316; *Gooch v Faucette* 122 NC 270, 29 SE 262; *Burrus v Witcover* 158 NC 384, 74 SE 11.

320. Can a contract confer rights on a person not a party to it, so as to entitle him to sue in his own name for a breach?

A. Yes.—Con Stat 446; *Faust v Faust* 144 NC 383, 57 SE 22.

CONVERSION

321. What is an equitable conversion?

A. By an equitable conversion is meant a change of property from real into personal, or from personal into real, not actually taking place, but presumed to exist only by construction or intendment of equity.—*Bispham's Equity* See 307; *Duckworth v Jordan* 138 NC 520, 51 SE 109; *Clifton v Owens* 170 NC 607 (616), 87 SE 502.

322. What is the difference between a conversion in equity and in law?

A. For conversion in equity see Question 321.

Conversion in law is an unauthorized assumption and exercise of the rights of ownership over goods and personal property belonging to another, to the alteration of their condition or exclusion of the owner's rights.—*Black's Law Dict.*

323. (a) Where testator devised lands to B for life, directing that at the death of the life tenant the land should be sold and the proceeds divided between B and C, at what time does conversion take place?

(b) Can a creditor of B enforce his debt against B's interest during the life of A by execution?

A. (a) At the time of the death of the life tenant.—*Elliott v Loftin* 160 NC 361, 76 SE 236.

(b) No.—*Clifton v Owens*, 170 NC 607, 87 SE 502.

324. What is a reconversion?

A. It is where the direction to convert is countermanded by the parties entitled to the property, or by an act of law.—*Bispham's Equity* See 322; *Clifton v Owens* 170 NC 607, 615, 87 SE 502.

CORPORATIONS

INCORPORATION AND ORGANIZATION, 336.
 CORPORATE EXISTENCE AND FRANCHISE, 341.
 CORPORATE NAME, DOMICILE, ETC., 349.
 CAPITAL STOCK AND DIVIDENDS, 353.
 MEMBERS AND STOCKHOLDERS, 364.
 OFFICERS AND AGENTS, 379.
 CORPORATE POWERS AND LIABILITIES, 390.
 INSOLVENCY AND RECEIVERS, 408.
 CONSOLIDATION, 412.
 DISSOLUTION AND FORFEITURE OF FRANCHISE, 413.

325. **What is a corporation?**

A. A body of individuals formed under the sanction of the state for a distinct and definite purpose.—Clark on Corporations 652.

326. **What are the distinguishing characteristics of a corporation?**

A. It is the merging of the individuals composing it into a separate legal entity.—Clark on Corps 9.

327. **Define the term "Corporation" as it is used in the Constitution of North Carolina.**

A. All associations and joint stock companies having any of the powers and privileges of corporations not possessed by individuals and partnerships.—NC Const Art VIII Sec 3.

328. **What classification of corporations is recognized by our state constitution?**

A. Municipal and those other than municipal.—NC Const Arts VII and VIII.

329. **What is a de facto and what is a de jure corporation?**

A. Where persons attempt, in good faith, to organize a corporation under a statute that is valid and that authorized such corporation, and afterwards assumed to exercise corporate powers, there is a corporation **de facto** though, by reason of failure to comply with the statute, there may not be a corporation **de jure**. A **de jure** corporation is regularly organized and conducted; a **de facto** corporation is not.—Clark on Corps 86 et seq.

330. What is the main distinction between private and public corporations?

A. Public corporations are organized for the purpose of government. Private corporations are organized for the purpose of private gain.—See Clark on Corps 26.

331. Distinguish between corporations, co-partnership associations, and joint stock companies.

A. Corporations are chartered by the state, act through agents and officers, shares may be transferred without assent of all other members, members are not liable for debts of corporations unless made by statute or by charter.

Joint stock companies are not chartered, act through agents and officers, shares may be transferred without assent of all other members, members are personally liable for debts.

Partnerships are not chartered, each partner may act for all, shares cannot be transferred without consent of all, members are personally liable for partnership debts, death of member terminates partnership.

332. What are quasi corporations?

A. They are bodies having some of the power of corporations but not all.—White v Comrs 90 NC 437.

333. What are the two chief distinctions between quasi public corporations and private ones?

A. Quasi public corporations may be given the right of eminent domain and are subject to public control in rates, etc., while private ones have neither of these qualifications.—See Clark on Corps 26 et seq.

334. What is a corporation aggregate, and of what does it consist?

A. It is a collection of individuals united into one body by law with powers of perpetual succession, and having for many purposes a separate legal entity.—I Black 469.

It is composed of more than one individual in contradistinction to corporations sole, which are composed of only one.

335. What is meant by title by succession?

A. The method of gaining property in chattels, either personal or real, which is in strictness of law only applicable to corporations, in which one set of men, by succeeding another set, acquires a property in all the goods, movables and other chattels of the corporation.—II Black 430.

INCORPORATION AND ORGANIZATION.

336. **By what authority are corporations created in this country?**

A. By Congress and the legislatures of the states and territories.—Clark on Corps 34.

337. **How may corporations other than municipal be formed?**

A. Under general laws, except corporations for charitable, educational, penal or reformatory purposes.—NC Const Art VIII Sec 1.

338. **Has Congress the power to grant charters of incorporation for business purposes, and if so, what is the limitation of such power?**

A. Yes, it may create corporations in the District of Columbia, and may also create elsewhere such as may be necessary or proper to enable the Federal Government to execute the powers expressly or impliedly conferred upon it by the Constitution.—Luxton v North River Bridge Co 147 US 337.

339. **What is a promoter?**

A. "A promoter is one who takes it upon himself to organize a corporation; to procure the necessary legislation where that is necessary; to procure the necessary subscribers to the articles of incorporation, where the corporation is organized under general laws; to see that the necessary document is presented to the proper officer of the state to be recorded and the certificate of incorporation issued; and generally to float the company."—10 Cyc 262.

340. **Can the fact that a corporation has not been regularly or legally organized be taken advantage of collaterally?**

A. Not ordinarily.—Clark on Corps 87.

CORPORATE EXISTENCE AND FRANCHISE.

341. **Has a corporation any legal existence outside of the state in which it was created?**

A. Strictly speaking it has not, but it is generally allowed to do business in other states by comity.—Clark on Corps 613; Shields v Ins Co 119 NC 380, 25 SE 951.

342. **Who can question the legal existence of a de facto corporation?**

A. The state.—Clark on Corps 87.

343. What is a franchise?

A. It is a special privilege conferred by the government upon an individual or corporation and which does not belong to the citizens of the country generally or of common right.—Black's Law Dict.

344. Define the franchise of a corporation.

A. The franchise of a corporation is the power or privilege conferred by the state upon an incorporated body not possessed by the inhabitants of the state as of common right.—10 Cyc 1085.

345. Can a corporation mortgage or sell or transfer its franchise without legislative authority?

A. No.—Clark on Corps 143.

346. What is the provision of the state constitution as to the power of the legislature over the charters of corporations?

A. "No corporation shall be created nor shall its charter be extended, altered, or amended by special act, except corporations for charitable, educational, penal or reformatory purposes that are to be and remain under the patronage and control of the State; but the General Assembly shall provide by general laws for the chartering and organization of all corporations, and for amending, extending, and forfeiture of all charters, except those above permitted by special act. All such general laws and special acts may be altered from time to time or repealed; and the General Assembly may at any time by special act repeal the charter of any corporation."—NC Const Art VIII Sec 1.

347. In cases of doubt, how are corporation charters to be construed?

A. Most strongly in favor of the public and against the corporation.—Clark on Corps 125.

348. When can the tangible property of a corporation be sold under execution separate from its franchise, and when not?

A. Can in all cases except in case of a public service corporation.—James v RR 121 NC 523, 28 SE 537; Pipe Co v Hawland 111 NC 615, 16 SE 857.

CORPORATE NAME, DOMICILE, ETC.

349. **How is the residence of a corporation determined?**

A. It is a citizen of the State by which it was created.—Clark on Corps 74.

350. **What is the law of comity?**

A. It is that principle by which a foreign corporation is allowed to do business in this state; an act of politeness on the part of one state toward another.—Range Co v Carter 118 NC 328 (335), 24 SE 352.

351. **Can a corporation chartered in another state exercise its franchise within this state if the comity to do so is withdrawn by the legislature?**

A. No.—Tobacco Co v Tobacco Co 145 NC 367, 59 SE 123.

352. **Who can contest the right of a foreign corporation to do business in this state?**

A. The Attorney General.—Con Stat 1181; Ober v Katzenstein 160 NC 439, 76 SE 476.

CAPITAL STOCK AND DIVIDENDS.

353. **What is the difference between the capital stock and the property of a corporation?**

A. The capital stock of a corporation is the amount in money or property subscribed and paid in, or secured to be paid in by the stockholders, and always remains the same unless changed by legislative authority. The capital of a corporation includes all the property of a corporation and may therefore be greater or less in value than the capital stock.—Clark on Corps 256.

354. **What is the meaning of the word "stock" in reference to a corporation; what does it represent; how is it transferred, and what rights have stockholders in and to the corporate property?**

A. It represents a shareholder's interest, and is transferred by assignment duly registered in the books of the corporation. Stockholders have no right to the corporate property.—Clark on Corps 260.

355. **How many kinds of stock may a corporation issue and how may the subscription be paid?**

A. Common and preferred stock. Payment may be made in money, in property or in services.—Con Stat 1156.

356. What is preferred stock, what is common stock, and what is watered stock?

A. Preferred stock is that which enjoys some special privilege, usually the payment of dividends; common stock is all other stock; watered stock is that issued for which nothing is paid to the corporation.—Clark on Corps 361, 368.

357. Is the delivery of a certificate of stock necessary to create the rights and liabilities of a stockholder?

A. This depends upon the law of the state in which the corporation is created. In this state it is not necessary.—Clark on Corps 416; Con Stat 1164.

358. Is a certificate of stock necessary to make a subscriber a stockholder?

A. No.—Clark on Corps 261.

359. Is a certificate of stock in a corporation which owns nothing except land, real property or personal property?

A. Personal property.—Con Stat 1164.

360. Is a subscription for shares in a joint stock company a contract upon which an action may be maintained?

A. Yes.—Clark on Corps 261.

361. A deposits shares of stock with B as security for a debt. A creditor levies an attachment on the stock, which has not been transferred to B on the stock book of the corporation. Has B or the creditor priority?

A. B has priority.—Bleakely v Candler 169 NC 16, 84 SE 1039.

362. Suppose in such case the subscriber and holder of such shares of stock have paid for same in property needed and taken by the corporation at the full face value of the shares, but in fact, only worth half that amount, what is the liability of the stockholder, and upon what principle determined?

A. He should pay the other half, on the ground that it is a fraud upon the creditors who deal with it believing that the stock is fully paid.—Clark on Corps 379.

363. What is meant by stock dividends and when, and out of what can it be issued?

A. The word "dividend" denotes a fund set apart by a corporation out of its profits to be apportioned among its share holders.—Trust Co v Mason 151 NC 264, 65 SE 1015.

The directors of every corporation created under this chapter shall in January of each year, unless some specified time for

that purpose is fixed in its charter, or by-laws, and in that case at the time so fixed, after reserving, over and above its capital stock paid in, as a working capital for the corporation, whatever sum has been filed by the stockholders, declare a dividend among its stockholders of the whole of its accumulated profits exceeding the amount reserved, and pay it to the stockholders on demand. The corporation may, in its certificate of incorporation or by-laws, give the directors power to fix the amount to be reserved as a working capital.—Con Stat 1178.

MEMBERS AND STOCKHOLDERS.

364. Are there any corporations without stockholders? If so, give an instance.

A. Yes, nonstock corporations, or those having no shares of stock, as most benevolent corporations which are incorporated and managed by trustees.—Clark on Corps 28.

365. In the absence of a special provision in the charter, does the inherent right to manage the affairs of a corporation belong to the stockholders or to the board of directors?

A. To the stockholders.—Clark on Corps 445.

366. Has a stockholder the right to inspect the books of a corporation?

A. Yes.—Clark on Corps 336; *Holt v Warehouse Co* 116 NC 480, 21 SE 919.

367. What corporations, if any, have the incidental right to expel members for cause?

A. Only nonstock corporations.—Clark on Corps 401.

368. For what offences may a stockholder be expelled in case where the charter is silent on the subject, or grants the power in general terms?

A. A stockholder may not be expelled from a stock corporation, but may be from a non-stock corporation; but in no case except for offences which make him unfit to have a voice in the control of the corporation, or that renders him unfit to associate with the other members, or as it is sometimes put:

(a) Offences of an infamous character, and indictable at common law, of which the party has been convicted.

(b) Offences against the party's duty to the corporation as a member of it.

(c) Offences compounded of these two.

369. Can the stockholders of a corporation interfere with the board of directors in the management of its concerns?

A. Not generally. If the directors act in bad faith, equity will protect the stockholders.—Clark on Corps 447, 519.

370. Suppose at a meeting which consists of a majority of the stockholders an officer be elected by a vote less than a majority of those present. Would the election be valid?

A. Yes.

371. What is a voting trust and is it valid?

A. A voting trust is where the stock of the various parties is placed in the hands of the trustees with the power to transfer the stock to themselves, and to hold and vote the same. Trustees certificates are then issued by the trustees to the various parties specifying the amount of stock so deposited by them.—Cook on Corps Sec 622.

A voting trust is not valid.—Harvey v Imp Co 118 NC 693, 24 SE 489.

372. Can an ultra vires contract, not binding upon the corporation, be made so by the ratification of the stockholders?

A. No.—See Clark on Corps 168.

373. Are stockholders as individuals ordinarily liable for the debts of the corporation?

A. No.—Clark on Corps 18.

374. In corporations having shares of stock and stockholders, what is the common law rule as to liability of such stockholders for the debts of the corporation?

A. At common law, the members of a business corporation are exempt from personal liability for the debts of the corporation beyond the amount of their respective proportion to the capital.—Clark on Corps 18.

375. Are members of a de facto corporation liable personally for its debts as in case of a partnership?

A. No.—Clark on Corps 108.

376. Can the obligation of the stockholders for corporate debts be established or changed by legislative amendment to their charter?

A. Yes, but the stockholders cannot be made liable by amendment for the debts incurred before the amendment.—Smathers v Bank 135 NC 410 (418), 47 SE 893.

377. If a business corporation, having shares of stock and stockholders become insolvent, what is the liability of stockholders who have not paid par value for the stock taken and held by them?

A. They must pay the par value and creditors may sue the corporation and stockholders and collect the par value.—Clark on Corps 590 et seq.

378. If a person solicits subscriptions for a corporation without authority and is guilty of fraud and the corporation ratifies the act in receiving the subscriptions can the subscriber hold the corporation bound by the contract, or it is absolutely void?

A. Corporation is not liable, the remedy being against the solicitor.—Austin v Murdock 127 NC 454, 37 SE 478.

OFFICERS AND AGENTS.

379. As a general rule, how do business corporations make contracts?

A. Through their officers and agents.—Clark on Corps 485.

380. Under what circumstances may a corporation insure the life of one of its officers under the North Carolina statute?

A. Where there devolves upon an officer or agent of a corporation such duties and responsibilities that a financial loss would result to the corporation from the death and consequent loss of the services of such officer or agent, the corporation has an insurable interest in and the power to insure the life of the officer or agent for its benefit.—Con Stat 1126.

381. Are the officers of a corporation the agents of the stockholders?

A. They are the agents of the corporation only.—Coble v Beall 130 NC 533, 41 SE 793.

382. How are the directors and managing officers of a corporation considered in reference to their corporate management, and what is the standard of duty imposed upon them in this respect?

A. They are agents of the corporation.—Clark on Corps 488.

While the directors of the corporation are not insurers, or guarantors, and therefore liable for its debts, yet they are trustees and liable as such for losses attributable to their bad faith, misconduct or want of care.—Townsend v Williams 117 NC 330, 23 SE 461.

383. **When is notice to an officer notice to the corporation?**

A. When he is acting as agent of the corporation.—*LeDuc v Moore* 111 NC 516, 15 SE 888.

384. **By our general statutes, are the directors required to be stockholders of a corporation?**

A. Yes.—Con Stat 1173.

385. **If the main place of meeting of a corporation has been changed would an election of officers at the old place be valid?**

A. No.—Con Stat 1168.

386. **Can the directors of a corporation convey to themselves the property of the corporation?**

A. "Directors are not disabled from entering into a contract with the corporation, provided there be enough directors on the other side of the contract to make a quorum, and provided the contract is open, fair and honest."—10 Cyc 794.

387. **Are the directors of a corporation individually liable for its losses? If so, in what cases?**

A. They are not, excepting cases where loss arises from fraud, negligence or misconduct.—*McIver v Hardware Co* 144 NC 478, 58 SE 169; Con Stat 1152, 1179.

388. **When do directors and other officers of a corporation become liable to it for losses sustained?**

A. When they are made so by statute or by charter or when the loss results from their negligence or bad faith.—*Clark on Corps* 521.

389. **What is the provision of our statute as to the individual liability of a president, directors, or managing officers of a corporation?**

A. In case of fraud by such officers, they are liable to the creditors and others injured by such fraud.—Con Stat 1152, 1179.

CORPORATE POWERS AND LIABILITIES.

390. **To what sources must we look to ascertain the powers of a corporation?**

A. To its charter and to the statutes regulating the powers of corporations.—See *Clark on Corps* 120 et seq.

391. **Has a corporation any powers except those conferred by law expressly or by necessary implication?**

A. No.—*Victor v Cotton Mills* 148 NC 107, 61 SE 648.

392. What implied powers has a corporation?

A. A corporation possesses only those implied powers which are necessary to enable it to carry out the powers expressly granted, and its express powers cannot be enlarged by implication.—Victor v Cotton Mills 148 NC 107, 61 SE 648.

393. Has a corporation any implied powers to accept a bill of exchange as an accommodation, or to execute an accommodation note?

A. No.—Clark on Corps 148.

Note: The question was given prior to 1916 amendment to Article VIII of the Constitution of North Carolina.—See Question 346.

394. By what methods may corporations in states of the American Union contract? Are their contracts made in jurisdictions other than that in which they are created, valid and enforceable?

A. They may contract through their officers and agents. Their contracts made in another jurisdiction, if in accordance with the laws of said jurisdiction, are valid.—Clark on Corps 612; Barcello v Hapgood 118 NC 712, 24 SE 124.

395. In the absence of an express provision in its charter, what class of contracts can a corporation ordinarily make?

A. A corporation has no power to enter into any contract that is not expressly or impliedly authorized by its charter. But any contract that is reasonably necessary or proper for carrying out the powers expressly conferred is impliedly authorized.—Clark on Corps 133.

396. What is necessary in order to bind a corporation by specialty?

A. See Question 397.

397. How may deeds of corporations conveying their lands be executed in North Carolina?

A. They must be made in the name of the corporation with the corporate seal attached, and signed in the name of the corporation by the president or their presiding officer and attested by the secretary, or they may be signed by the president or other presiding officer and two members of the corporation and their signatures proved by a witness.—Con Stat 1138.

398. When may a corporation take in good faith and hold stock in another corporation?

A. Any corporation may purchase, hold, assign, transfer, mortgage, pledge or otherwise dispose of the shares of the cap-

ital stock of, or any bonds, securities or evidence of indebtedness created by any other corporation or corporations of this or any other state, and while owner of such stock, may exercise all the rights, powers and privileges of ownership, including the right to vote thereon.—Con Stat 1166.

399. What is ultra vires? Give an illustration.

A. It is the term used to express the action of a corporation which is beyond the powers conferred upon it by charter, or the statute under which it was created. Banking by a manufacturing company would be an ultra vires act.—Black's Law Dict.

400. What is the presumption as to the contracts made by a corporation being ultra vires, or intra vires?

A. Unless the contrary is shown, the contracts of a corporation are presumed to be within its powers.—Clark on Corps 135.

401. Can a corporation exert its powers to make a contract beyond the limits of the state in which it was created?

A. Yes, by comity.—Tobacco Co v Tobacco Co 145 NC 367, 59 SE 123.

402. When can the defense of ultra vires be successfully maintained by a corporation?

A. This is a mooted question about which the courts of the United States differ materially. The rule seems to prevail most generally that the defense is allowable only when the contract has not been performed by the other party, wholly, or in part, and it would not be equitable to hold the contract void. This defense does not seem to be available generally in this state.—Clark on Corps 180; Hutchins v Bank 128 NC 72, 38 SE 252.

403. Can a private or ordinary public service corporation be held liable for torts of its agents and employees, and if so, under what circumstances?

A. Yes, when the tort was committed in the ordinary course of business of the corporation.—Pierce v RR 124 NC 83, 32 SE 399.

404. Is the lessor corporation liable for the acts of the lessee corporation in the operation of the leased property?

A. Yes.—Brown v RR 131 NC 455, 42 SE 911; Lloyd v RR 166 NC 24, 81 SE 1003.

405. **When is a corporation liable for the torts of its officers and agents?**

A. When committed in connection with its business, or by its authority, express or implied. In the case of common carriers, when in connection with its business.—*Redditt v Singer Mfg Co* 124 NC 100, 32 SE 392.

406. **Is a corporation indictable for a crime in which the intent is an essential element?**

A. Yes.—*State v Ice Co* 166 NC 366, 81 SE 737.

407. **Can a corporation be held liable criminally for malicious wrongs or wrongs involving the element of personal violence?**

A. See Question 406.

INSOLVENCY AND RECEIVERS.

408. **In a corporation having shares of stock and stockholders 75% on the shares of the capital stock is paid in. On insolvency what are the rights of the creditors as to the unpaid balance, and, if any, how can these rights be asserted?**

A. " 'It is a favorite doctrine of the American courts that the capital stock and other property of a corporation are to be deemed a trust fund for the payment of the debts of the corporation'—etc. 10 Cyc 553. The same authorities conclusively settle the doctrine that unpaid subscriptions to stock constitute a part of the assets of the corporations, and are to be sued for and recovered in the same manner as other assets, certainly to the extent that they are necessary for the payment of its debts. Judge Thompson, in his very able and exhaustive article on 'Corporations,' 10 Cyc, says that the remedy for the recovery of such unpaid subscriptions is, in the absence of any statutory provision in equity, that when for any reason it becomes necessary to afford an effective remedy a court of equity will direct suit to be brought by the directors or by 'its own proper officers.' "—*Smathers v Bank* 135 NC 410, 47 SE 893; See *Clark on Corps* 591; *Con Stat* 1160; *Foundry Co v Ellington* 99 NC 501, 6 SE 680.

409. **In like case, if 75% of the shares has been paid in full and the balance given to nonsubscribers (who pay nothing thereon) on the supposition that the business of the corpora-**

tion may be thereby aided and increased; upon insolvency what are the rights of the creditors against the holders of the unpaid stock?

A. The weight of authority seems to be that if the stock so given is accepted, the ones to accept become liable to creditors for par value of stock, under the trust fund rule.—*Handly v Stultz* 139 US 417; *Foundry Co v Killian* 99 NC 501, 6 SE 680.

410. Is the statute of limitations open as a defense to a foreign corporation doing business in this state and complying with the laws of this state?

A. Yes.—*Volivar v Cedar Works* 152 NC 656, 68 SE 200.

411. How and by what proceedings is the property of an insolvent corporation administered?

A. By a receiver appointed by a judge of a Superior Court.—*Con Stat* 1208, 1214.

CONSOLIDATION.

412. Where corporations of different states are consolidated under similar acts in each state, or where one state makes a corporation of another state, as there conducted, a corporation of its own, is there in legal effect a separate corporation in each state, or only one corporation in both states?

A. For many purposes it is a separate corporation in both states.—*Bernhart v Brown* 119 NC 506, 26 SE 162; 10 Cyc 170.

DISSOLUTION AND FORFEITURE OF FRANCHISE.

413. Under the common law, what becomes of the real property of a corporation upon its dissolution?

A. It reverts to the grantor.—*Clark on Corps* 351.

414. Under the North Carolina statute what becomes of the real property of the corporation upon its dissolution?

A. It is sold, and the proceeds, so far as are necessary, are applied to the payment of the debts of the corporation, and any surplus divided among the stockholders.—*Con Stat* 1198.

415. In case of dissolution of the corporation, what is the legal distribution of its property?

A. 1st. Payment of allowances, expenses and costs incurred by the dissolution.

2nd. Creditors of corporation.

3rd. Preferred stockholders.

4th. General stockholders.—*Con Stat* 1198.

416. **Are corporation charters subject to repeal or modification by the legislature?**

A. No.—See Question 346.

417. **Can the legislature repeal the charter of a corporation? Can it alter such charter without the consent of the company?**

A. No.—See Question 346.

COURTS

418. **What courts, exercising what jurisdiction, can the legislature create?**

A. It may create any court it sees fit inferior to the Supreme Court, and may allot and distribute jurisdiction among them as it may deem best.—NC Const Art IV Sec 12.

419. **What is meant by jurisdiction?**

A. Jurisdiction is the power to hear and determine cases.—State v Hall 142 NC 710 (713), 55 SE 806.

420. **Give the different ways in which a court may obtain jurisdiction of a defendant.**

A. In civil actions by summons. In criminal actions by warrant and capias.—Con Stat 475, 4513.

421. **What is the jurisdiction of the Supreme Court?**

A. It has appellate jurisdiction of all questions of law determined in Superior Court. It has original jurisdiction of all actions against the State. It has power to issue all remedial writs necessary to give it power and control over proceedings of inferior courts.—Con Stat 1410, 1411.

422. **What is the jurisdiction of the Superior Court?**

A. Superior Court has jurisdiction of all matters not cognizable in courts of justice of the peace and in which exclusive jurisdiction is not given to some other court. Also appellate jurisdiction in all cases begun in justices court.—Con Stat 1436.

423. **How is an action begun in the Superior Court?**

A. In civil actions by summons. In criminal actions by indictment and capias.—Con Stat 475, 4513.

424. **In case a client consults you stating a case which makes out a breach of contract, in what court would you seek relief, and how would you proceed?**

A. If the amount in controversy was not over \$200 exclu-

sive of interest, would sue in justice court. If over \$200 would sue in Superior Court. In both cases would begin by issuing summons.—Con Stat 1473, 1474.

425. What is the jurisdiction of the Recorder's Court?

A. Recorder has jurisdiction given by statute establishing the court.

426. What jurisdiction can the Legislature confer on courts inferior to the Supreme Court?

A. The Constitution, Art IV Sec 12, gives to the general assembly express power to allot and distribute the jurisdiction below the Supreme Court, among the other courts prescribed in the Constitution or which may be created by the Legislature, in such a manner as it may deem best, if done without conflict with other provisions of this Constitution.—*Rhyne v Lipscombe* 122 NC 650, 29 SE 57.

427. What was the origin of the Court of Common Pleas?

A. It was provided in Magna Carta that the Court of Common Pleas should remain fixed instead of compelling the suitors to follow the king wherever he might go. This led to appointment of the judges of the Court of Common Pleas.—III Black 38.

COVENANTS

428. Enumerate and define the principal covenants usually contained in a deed.

- A. (1) Covenant of seizin, or right to convey.
 (2) Against encumbrances, an encumbrance being "any right to, or interest in, land, which may subsist in third persons, to the diminution of the value of the estate of the tenant, but consistently with the passing of the fee."
 (3) Of warranty, whereby the grantor covenants that he will "forever defend the title to the same against the claims of all persons whomsoever." This sprang from the English covenant of quiet enjoyment.—See Question 1256; III Washburn's Real Property 447 et seq; Black's Law Dict.

429. Name the covenants necessary to be incorporated in a deed of bargain and sale.

A. Covenants of seizin, against encumbrances, and for quiet enjoyment are the most common.—II Black 304.

430. What is the difference between a covenant of seizin and one of general warranty, and when can an action be maintained on each?

A. In covenants of seizin the grantor warrants that he is now seized of the land, and if this is not true, there is a breach of the covenant and suit may be brought at any time within ten years. In general warranty of title there is not a breach until grantee is evicted and suit may be brought at any time within ten years after the breach.—*Eames v Armstrong* 142 NC 506, 55 SE 405; *Britton v Ruffin* 123 NC 67, 31 SE 271.

431. What is a warranty as applied to sales of land?

A. A covenant real which runs with the land, whereby the grantor, both for himself and his heirs, warrants and secures to the grantee the estate so granted—II Black 300.

432. What is the measure of damages for a breach of covenant of quiet enjoyment?

A. Purchase money and interest.—*Eames v Armstrong* 142 NC 506, 55 SE 405.

433. In case of an action brought and recovery had, what additional damages may be had by the vendee on breach of covenant of quiet enjoyment, and what steps are necessary to entitle vendee to such damages?

A. By giving notice to the vendor to defend the title which he warranted, and if he fail to do so, and if vendee is evicted, he may recover costs and expenses in addition to purchase money and interest from time of dispossession.—*Wiggins v Pender* 132 NC 628, 44 SE 362.

434. How, if at all, are the assignee and sublessee affected by the covenants in the original lease?

A. In case of assignment the privity of estate and privity of contract subsist between the lessor and the assignee as it did between the lessor and the lessee. In case of subletting or underlease as between the original lessor and the under-tenant, there is neither privity of estate or contract, so that between these parties no advantage can be taken of the covenants in the lease, and therefore, the lessor cannot sue an under-tenant upon the lessee's covenant to pay rent, nor can he maintain an action for use and occupation against the under-tenant unless upon an agreement, as the relation of landlord and tenant does not subsist between them.—*Krider v Ramsey* 79 NC 354.

435. What is meant by a covenant running with the land, and what covenants run with the land?

A. A covenant running with the land is one that inures to the benefit of a subsequent purchaser of the estate. In this country, the covenants for title, considered as running with the land, are those for quiet enjoyment, for further assurance, and of warranty.—*Wiggins v Pender* 132 NC 628 (637), 44 SE 362.

436. What is the controlling test and distinction between covenants that run with the land and those that do not?

A. "It is said in *Minors Institutes*: 'Covenants which run with the land are those which affect the nature, quality or value of the thing granted, and where there is a privity of estate between the contracting parties—as a covenant to be answerable for the title.'"—*Wiggins v Pender* 132 NC 628, 44 SE 362.

437. What constitutes a breach of covenant against encumbrance?

A. If there be an encumbrance, the covenant being in presenti is broken as soon as made.—III Washburn Real Property 459; *Wiggins v Pender* 132 NC 628 (634), 44 SE 362.

438. How is A, who has given a deed with warranty to B, affected, if at all, by a judgment against the latter by one claiming under a paramount title, B having afterwards been evicted under a writ of possession issued upon the judgment, and what is B's remedy against A upon the warranty?

A. A is liable for a breach of warranty, B's remedy being a suit upon the warranty.

439. If A covenants to B with warranty to him and his heirs, without the use of the word "assigns," can a subsequent grantee of B maintain an action for a breach of warranty? Give reason.

A. Yes. The warranty is a covenant that runs with the land.—*Smith v Ingram* 132 NC 959 (963), 44 SE 643.

440. A sells land to B with warranty. B sells to C without warranty. C is evicted by title paramount to A. Has C any remedy, and if so, why?

A. Yes, he may sue A on the warranty.—*Wiggins v Pender* 132 NC 628 (638), 44 SE 362.

441. Who may make entry upon land for the breach of a condition and is the right of entry assignable by grant or other conveyance?

A. The grantor or his heirs. Right of entry is assignable.—*Huntley v McBrayer* 172 NC 642, 90 SE 754; II Black 153.

CRIMINAL LAW

NATURE AND ELEMENTS OF CRIME, 442.

CAPACITY TO COMMIT AND RESPONSIBILITY FOR CRIME, 448.

PARTIES TO OFFENCES, 455.

LIMITATION OF PROSECUTION, 456.

EVIDENCE, 459.

TRIAL, 465.

MOTIONS FOR NEW TRIAL, AND IN ARREST, 470.

APPEAL, 473.

PUNISHMENT AND PREVENTION OF CRIME, 474.

NATURE AND ELEMENTS OF CRIME AND DEFENSES IN GENERAL.

442. How are crimes classified by our statute, and what is the dividing line?

A. They are divided into felonies and misdemeanors. All crimes punishable with death or imprisonment in the state prison are felonies. All others are misdemeanors.—*Con Stat* 4171; IV Black 94.

443. What is meant by crimes *mala in se*, and *mala prohibita*?

A. Crimes *mala in se* are those which are morally wrong and need no statutory enactment to declare them wrong. Crimes *mala prohibita* are those which are crimes only by reason of statutory enactment.—IV Black 8.

444. How many crimes under the statute are punishable capitally, and as to these how many may the legislature abolish capital punishment, should it see fit?

A. Murder, burglary, arson and rape are punishable with death in this state. The legislature may abolish capital punishment in all of them.—NC Const Art XI Sec 2.

445. Does an attempt to commit a crime constitute an indictable offense?

A. Yes.—*State v Hewitt* 158 NC 627, 74 SE 356.

446. **Give the legal definition of malice.**

A. Malice is a condition of the mind which shows a heart regardless of social duty and fatally bent on mischief, the existence of which is inferred from acts committed or words spoken.—Black's Law Dict.

447. **What is the difference between a tort and a crime, as stated by Blackstone and other writers?**

A. The former is an infringement or privation of the private or civil rights belonging to individuals, considered as individuals, and is thereupon frequently termed a civil injury. The latter is a breach and violation of public rights and duties, which affect the whole community, considered as a community, and is distinguished by the harsher appellation of a crime or misdemeanor.—III Black 2.

CAPACITY TO COMMIT AND RESPONSIBILITY FOR CRIME.

448. **What is the rule as to the liability of infants for criminal acts?**

A. Before the age of seven an infant cannot be indicted for a crime. From the age of seven to fourteen an infant cannot be indicted for a misdemeanor, and is presumed to be incapable of committing a felony, but this presumption may be rebutted, except in rape, in which case he must be fourteen, and in embezzlement he must be sixteen.—State v Yeargin 117 NC 706, 23 SE 153; State v McNair 93 NC 629; Con Stat 4268.

449. **What is the rule of law with regard to the criminal responsibility of a married woman for a crime committed by her in the presence of her husband, and in what respect is there a difference between felonies and misdemeanors?**

A. There is a presumption that she acted under the coercion of her husband, which presumption may be rebutted by the state. It seems that there was a distinction formerly, but that now the doctrine applies to both felonies and misdemeanors.—State v Norvell 156 NC 648; State v Williams 65 NC 398, 72 SE 590; State v Seahorn 166 NC 373, 81 SE 687.

450. **Is ignorance of fact or law an excuse for crime?**

A. "It is a well-settled principle that ignorance of the law excuses no criminal act. It is a maxim, *ignorantia juris quod quisque tenetur scire, neminem excusat*. Every person is presumed and bound to know the law. Thus Justice Black-

stone states, if a man thinks he has a right to kill an excommunicated or outlawed person, wherever he meets him, and does so, it is murder.—IV Black 27; State v Robins 28 NC 23; State v Boyett 32 NC 336.

451. What is the rule of liability when insanity is pleaded in a criminal action, and upon whom is the burden of proof?

A. Insanity at the time of committing the offence is a complete defense, but the burden of proof is always on the defendant.—State v Potts 100 NC 451, 6 SE 657.

452. What is the effect of drunkenness on criminal liability?

A. Voluntary drunkenness is never an excuse for crime.—State v Kale 124 NC 816, 32 SE 892.

453. Is a municipal corporation liable, civilly or criminally, for the unlawful acts of its police officers? Give your reason.

A. A policeman, though appointed by the mayor and aldermen of a city, is a state officer, and not an officer of the city, for whose torts such city is liable, in the absence of statute imposing liability.—McIlhenny v Wilmington 127 NC 146, 37 SE 187.

While a municipality is not liable for personal injuries resulting from the exercise of its governmental powers, it is liable for damage to property caused by the torts of its officers in discharging its governmental functions, under the doctrine of *respondeat superior*.—Metz v Asheville 150 NC 748, 64 SE 881, 22 LRA NS, 940 cited in note in 47 LRA NS 138.

454. A persuades B to cut off his (A's) right hand in order that he may ply his trade as a beggar more successfully. Is B guilty of a crime? Give reason.

A. Yes.—Con Stat 4211. A's consent for B to maim him is void.—Stout v Wren 8 NC 420.

PARTIES TO OFFENSES.

455. Does the distinction between principals and accessories before the fact in capital cases still obtain, or are the accessories before the fact now in effect co-principals and triable as such?

A. Distinction abolished by Con Stat 4175; State v Bryson 173 NC 803, 92 SE 698.

LIMITATION OF PROSECUTION.

456. What is the statute of limitations as to misdemeanors and also as to felonies?

A. Two years for misdemeanors. None for felonies.—Con State 4512.

457. What is a presentment and does it stop the running of the statute of limitations?

A. A presentment is an accusation made *ex mero motu* by a grand jury of an offense upon their own observation and knowledge or upon evidence before them, and without any bill of indictment being laid before them, at the suit of the government. It stops the running of the statute of limitation.—State v Morris 104 NC 837, 10 SE 454; State v Cox 28 NC 440.

458. A commits a crime on May 1, 1908. At that time the statute of limitations for such crimes was three years. On May 3, 1911, the legislature passed an act by which such limitation is extended to five years. In July, 1912, A is arrested for the offense committed May, 1908. In case you appear in court for A, what defense would you interpose?

A. Statute of limitations. An attempt to apply a statute of limitations of May 3, 1911, would be an *ex post facto* law.

EVIDENCE.

459. What presumption favors one accused of crime and what is the rule of law fixing the degrees of proof by which guilt should be ascertained by the court?

A. Every one is presumed to be innocent until the contrary is proved, which must be done by proof that satisfies the jury beyond a reasonable doubt.—State v West 152 NC 832. 68 SE 14.

460. In this state is it contempt to offer in evidence the testimony of an accomplice in a criminal indictment?

A. Yes.—Con Stat 1792.

461. A writes to his wife admitting the commission of a crime. Is the letter competent evidence in a trial of A for the crime referred to in the letter? Give the reason.

A. It is competent for a third person to introduce in evidence such a letter.—State v Wallace 162 NC 622.

462. **What is essential in order to render a confession admissible?**

A. To be admissible a confession must be voluntary and must not be induced by either hope or fear.—Lockhart's Ev Sec 174.

463. **What would be the effect of the discovery of relevant facts from information contained in a confession improperly obtained? Would they be competent as evidence?**

A. Would be incompetent as evidence.—Lockhart's Ev Sec 174.

464. **What is the distinction between judicial confessions and extra-judicial confessions?**

A. Judicial confessions are made in open court, while extra-judicial confessions are made out of court.—I Green Ev Sec 216.

TRIAL.

465. **Suppose a prisoner stands mute, refusing to plead either guilty or not guilty, what course was taken at common law and what is our present procedure?**

A. At common law he was compelled to plead by placing heavy weights on him until he did so.—IV Black 324, 329. Now the plea of "not guilty" is entered for him.—Con Stat 4632.

466. **Can a verdict in a criminal action be received in the absence of the defendant?**

A. Not in capital cases. In other cases he has the right to be present, but may waive this right.—State v Dry 152 NC 813, 67 SE 1000.

467. **Upon an indictment for an offense, can a jury find the prisoner guilty of an attempt to commit a less degree of the same crime?**

A. Yes.—Con Stat 4640; State v Matthews 142 NC 621, 55 SE 342.

468. **Under our Criminal procedure, in indictment for crime, what are the different verdicts that a jury may render according to the facts in evidence?**

A. May be convicted of crime charged in bill, or of less degree of same crime, or of an attempt to commit the crime, or an attempt to commit a less degree of the same crime.—Con Stat 4640.

469. **What is the rule prevailing in this state as to the right of the defendant prosecuted for crime to be present when verdict is rendered against him? Can such right be waived, and in what cases?**

A. Defendant has the right to be present when verdict is rendered against him. This right he may waive except in capital cases.—State v Austin 108 NC 780 (785), 13 SE 219.

MOTIONS FOR A NEW TRIAL AND IN ARREST.

470. **At what stage of the trial must a defendant indicted for a crime move to quash the indictment?**

A. Before the jury is impanelled.—State v Miller 100 NC 543, 5 SE 925.

471. **What is a motion in arrest of judgment in criminal practice, and when will judgment be arrested?**

A. It is the method of taking advantage of some defect in the bill of indictment or other part of the record. Judgment will be arrested when there is any material defect apparent on the record.—State v Francis 157 NC 612, 72 SE 1041.

472. **When is a motion in arrest of judgment in criminal matters proper?**

A. When it appears that bill of indictment is so defective that judgment cannot be pronounced upon it.—State v Francis 157 NC 612, 72 SE 1041.

APPEAL.

473. **When may the state appeal in criminal matters?**

- A. 1. Upon a special verdict.
2. Upon demurrer.
3. Upon motion to quash.
4. Upon arrest of judgment.—Con Stat 4249.

PUNISHMENT AND PREVENTION OF CRIME.

474. **What is the object of punishment under our Constitution?**

A. "Not only to satisfy justice, but to reform the offender, and thus prevent crime."—NC Const Art XI Sec 2.

475. **Before 1868 the courts, upon conviction for certain offenses, could impose sentence of corporal punishment, such as**

whipping, branding with hot irons, and cutting off the offender's ears. What provision did the Constitution adopt in regard to such punishment?

A. "Excessive bail should not be required nor excessive fines imposed, nor cruel or unusual punishments inflicted."—NC Const Art I Sec 14.

CURTESY

476. What is an estate by the curtesy, and what four things are necessary to create such an estate?

A. An estate by the curtesy arises where a man marries a woman seized of an estate of inheritance, and has by her issue born alive capable of inheriting. In this case he shall upon her death, he surviving her, hold the lands for the term of his life as tenant by the curtesy.—II Black 126.

Requisites:

1. Valid marriage.
2. Seizin of wife.
3. Birth of issue alive.
4. Death of wife.—II Black 127.

477. Is there such an estate now as tenancy by curtesy initiate? When did an estate by the curtesy become consummate at common law, and when does it vest in right and possession under the present law?

A. Yes. "At common law the husband, upon the marriage was seized in right of his wife of a freehold interest in her lands during their joint lives until birth of issue, both husband and wife must have done homage to the lord. After the birth of issue he was seized of an estate in his own right, called tenancy by the curtesy **initiate**, and did homage alone. This estate, if he survives his wife, was called tenancy by the curtesy **consummate**, and inured to his benefit for life. Under the present law, it vests in right at the time of the birth of issue, and in possession at the time of the death of wife."—Taylor v Taylor 112 NC 134, 16 SE 1019; Con Stat 2519.

478. When is a man tenant by the curtesy initiate, and when by the curtesy consummate?

A. At common law, when there is a legal marriage, seizin of wife, and birth of issue capable of inheriting, he becomes tenant by the curtesy initiate; and upon death of wife, he becomes tenant by the curtesy consummate.—II Black 126 et seq.

479. How may tenancy by curtesy be forfeited?

A. By divorce, by felonious slaying of wife, by abandonment, and by separation and living in adultery.—Con Stat 2522-2524.

480. Can the husband by the curtesy initiate be deprived of his estate or interest by act of his wife, and if so, in what way?

A. Yes, by will properly executed.—Tiddy v Graves 126 NC 620, 36 SE 127.

DAMAGES

GROUND AND SUBJECTS OF DAMAGES, 481.

EXEMPLARY AND PUNITIVE DAMAGES, 485.

MEASURE OF DAMAGES, 488.

GROUND AND SUBJECTS OF DAMAGES.

481. In what cases are damages allowable for mental anguish?

A. When such damages were reasonably in the contemplation of the parties as to the natural result of failure of duty on the part of the defendant.—Hancock v Tel Co 142 NC 163, 55 SE 82.

482. In case of a contract broken or tort suffered, what is the duty imposed upon the injured party in reference to damages?

A. Injured party must do what he reasonably can in exercise of reasonable care to avoid or lessen the consequences of the wrong.—Bowen v King 146 NC 385 (391), 59 SE 1044.

483. What duty is imposed upon one who is injured by another's breach of contract or tort, as to damages?

A. Injured party must do what he reasonably can to make the injury light as possible.—Hocutt v Tel Co 147 NC 186 (193), 60 SE 980.

484. Is a lunatic answerable in compensatory and punitive damages for a tort? Give the reason.

A. Answerable for compensatory but not punitive damages.—Moore v Horne 153 NC 413, 69 SE 409.

EXEMPLARY AND PUNITIVE DAMAGES.

485. When are exemplary, punitive and vindictive damages recoverable?

A. When the wrongful act was accompanied by fraud, malice, recklessness, oppression or other wilful and wanton aggravation on the part of the defendant.—Hayes v RR 141 NC 195, 53 SE 847.

486. Are punitive damages sometimes given in tort, and if so, under what circumstances?

A. Yes, when party has acted maliciously, wantonly, or with criminal indifference to civil obligations.—Jackson v Tel Co 139 NC 347, 51 SE 1015.

487. Can punitive damages be recovered of a lunatic?

A. No.—Moore v Horne 153 NC 413, 69 SE 409.

MEASURE OF DAMAGES.

488. What is the measure of damages for an ordinary tort?

A. "All damages directly caused by his misconduct and all indirect or consequential damages which are the natural and probable effect of the wrong."—Bowen v King 146 NC 385 (390), 59 SE 1044.

489. What is the ordinary rule for the assessment of damages in actions *ex contractu*?

A. As a general rule, for breach of contract, only such damages as are caused by the breach are recoverable.—Spencer v Hamilton 113 NC 49, 18 SE 167; Tompkins v Dallas Cotton Mills 130 NC 347 (352), 41 SE 938.

490. What is the measure of damages for a breach of fitness, quality or condition, in a sale of goods?

A. The measure of damages for such breach of warranty is the difference between the contract price and the actual value, with such special damages as were within the contemplation of the parties.—Critchler v Porter Co 135 NC 542, 47 SE 304.

491. In actions for the breaking of personal contracts, what is the rule as to the measure of damages, and what leading English case clearly sets forth the rule?

A. He is liable only for such damages as are caused by the breach, or such as being incidental to acts of omission or commission as the natural consequence thereof may reasonably

be presumed to have been in contemplation of the parties when the contract was made. The leading case is *Hadley v Baxendale*.—*Lewark v RR* 137 NC 383, 49 SE 882.

492. A forcibly takes personal property from the possession of B and in an action brought by B against A it is admitted that A has no title to the property. Can A deny the title of B? What damages, if any, can B recover without proof of title?

A. No. Such damages as B sustained by reason of deprivation of the property.

493. In an action to recover damages in a breach of contract for failure to deliver goods having a market value, what is the general rule as to the measure of damages?

A. The difference between the contract prices and the market value at the time when and place where they should have been delivered.—*Hosiery Co v Cotton Mills* 140 NC 452, 53 SE 140; See also Question 1273.

DEATH

494. What is the measure of damages for wrongful death?

A. The recovery for wrongful death is what deceased would have earned, reduced only by what his personal expenses would have been.—*Robeson v Lbr Co* 154 NC 328, 70 SE 630.

495. What is the rule with regard to the assessment of damages in such cases?

A. A fair and just compensation for the pecuniary injury resulting from such death.—*Con Stat* 161.

496. Who is entitled to the sum recovered as damages for wrongful death?

A. The personal representative.—*Con Stat* 160.

497. How is the sum recovered in an action for wrongful death applied?

A. As provided by statute for distribution of personal property in case of intestacy, and not as assets for the payment of debts.—*Con Stat* 160.

498. What act was the origin of the law to recover for injuries producing death, and what was the practical effect of the act?

A. Lord Campbell's Act (1846). It gives the personal representative the right to recover damages for wrongful death, but the recovery is for the benefit of the distributees.—*Killian v RR* 128 NC 261, 38 SE 873.

DEDICATION

499. What is essential to the acquisition of title to land, or an easement therein by dedication?

A. A dedication by the owner and an acceptance by the public or persons in a position to act for them.—Tise v Whitaker-Harvey Co 146 NC 374, 59 SE 1012.

DEEDS

REQUISITES AND VALIDITY, 506.

RECORDING AND REGISTRATION, 514.

CONSTRUCTION AND OPERATION, 521.

500. How is the title to real property generally conveyed?

A. By will and by deed.—II Black 200.

501. Under the common law having its origin in the feudal system, did a man have the free right to alien his land?

A. No.—II Black 57.

502. Under what reign was the quality of unfettered rights of alienation attached to a fee simple estate, and what was the statute called?

A. Restraints of alienation disappeared with the enactment of the statute of qui emptories, 18 Edward I, but fines for alienation were abolished by 12 Car. II (1660).—II Black 289.

503. What are the conveyances by the common law—original and derivative?

A. Original conveyances are: feoffment, gift, grant, lease, exchange and partition.

Derivative conveyances are: release, confirmation, surrender, assignment and defeasance.—II Black 310.

504. A agrees to execute a deed to B in consideration of five hundred dollars for land described as follows: Beginning at a stake runs north 100 poles to a stake; then east 100 poles to a stake; then south 100 poles to a stake; then west 100 poles to the beginning. Draw the deed without covenants.
STATE OF NORTH CAROLINA, WAKE COUNTY.

THIS DEED, made this the 13th day of August, 1920, by A. of Wake County, State of North Carolina, party of the first part, to B, of Wake County, State of North Carolina, party of the second part.

WITNESSETH, that said A, party of the first part, in consideration of the sum of Five Hundred Dollars to him paid by B, party of the second part, the receipt of which is hereby acknowledged, has bargained and sold, and by these presents does grant, bargain, sell and convey to B, party of the second part, his heirs and assigns, a certain tract or parcel of land in Wake County, State of North Carolina, bounded as follows:

BEGINNING at a stake, runs north 100 poles to a stake; then east 100 poles to a stake; then south 100 poles to a stake; then west 100 poles to the BEGINNING.

TO HAVE AND TO HOLD the aforesaid tract or parcel of land and all privileges and appurtenances thereto belonging, to the said B, his heirs and assigns, to their only use and behoof forever.

IN TESTIMONY WHEREOF, the said A has hereunto set his hand and seal, the day and year first above written.

A (Seal.)

505. Does the deed in the preceding question convey any land? Give the reason.

A. It only conveys such interest as A may have or acquire in the land, but if question is taken literally it conveys nothing on account of vagueness of description.—Barker v RR 125 NC 596 (598), 34 SE 701.

REQUISITES AND VALIDITY.

506. What are the legal and orderly parts of a deed at common law?

A. **The premises** in a deed is used to set forth the number and names of the parties with their addition or title.

The Habendum expresses what estate or interest is granted in the deed.

The Tenendum “and to hold” is now of little use and kept in only by custom.

The Reddendum is a reservation whereby the grantor doth create or reserve to himself some new thing out of what he had before granted, as rent, or the like.

The Conditions, if any, are clauses of contingency upon the happening of which the estate may be defeated.

The Covenants are clauses of agreement contained in the deed whereby either party may stipulate for the truth of certain facts, or may bind himself to perform or give something to the other.

The Warranty is that clause or part whereby the grantor doth for himself and his heirs warrant and secure to the grantee the estate so granted.

The Conclusion in a deed mentions the execution and date of it.—II Black 298, 299.

507. **What are the legal requisites of a deed?**

- A. 1. Grantor, grantee, and thing granted.
2. Sufficient consideration.
3. Written or printed on parchment or paper.
4. Must be legally and orderly set forth.
5. Must be sealed, and since the statute of frauds, signed.
6. Must be delivered.
7. Must be duly attested, and now, registered.—II Black

296 et seq.

508. **Is a deed without consideration good against creditors and against purchasers for a valuable consideration and without notice of the prior deed?**

A. No.—Con Stat 1005.

509. **Was a conveyance at common law required to be in writing?**

A. Yes.—II Black 297.

510. **Is a deed without consideration good?**

A. Yes, unless it can be set aside as fraudulent.—Howard v Turner 125 NC 107, 34 SE 229.

511. **What is necessary to constitute a good and effective delivery of a deed?**

A. The deed must pass from the possession and control of the grantor to that of the grantee, or to someone for the grantor's use and benefit, with the intent at the time that the title should pass if the instrument become effective as a conveyance.—Gaylord v Gaylord 150 NC 222 (233), 63 SE 1028; Rogers v Jones 172 NC 156, 90 SE 117.

512. **At common law could a child in its mother's womb be a grantee in a deed? How is it now under the law of this state?**

A. Could not at common law, but can under our statute.—Dupree v Dupree 45 NC 164; Con Stat 1738.

513. **A grant for 100 acres of land was issued to A on July 1st, 1893, and on July 1st, 1894, another grant for the same land was issued to B, who entered into possession and held the same adversely for seven years. Who is the owner of the land, and why? The purpose of this question is to ascertain**

whether you know of an act of the General Assembly relative to grants, which was enacted in 1893, and is now a part of the Revisal.

A. A is owner under Revisal, Section 1699 (now Con Stat 7545). This act declares such junior grants not to be color of title.

RECORDING AND REGISTRATION.

514. **What was the ceremony attendant upon common law conveyances, and necessary to their validity?**

A. Livery of seizin.—II Black 311.

515. **What is meant by livery of seizin?**

A. "The completion of the feudal investiture by which the tenant was admitted to the feud and performed the rites of homage and fealty." This definition is the feudal acceptance of the word. Possession with intent upon the part of him who holds to claim a freehold interest. Seizin is of two kinds, seizin in deed and seizin in law.—II Black 311, et seq.

516. **What has taken the place of livery of seizin in our present law?**

A. Registration.—Con Stat 3308; *Hare v Jennigan* 76 NC 471.

517. **What is the present statute with respect to registration of ordinary deeds in reference to their priority?**

A. The deed only passes title as against creditors and purchasers for value from date of registration.—Con Stat 3308-3310.

518. **Why was the Connor Act passed, and what was its effect?**

A. The Code (1883), Section 1245, limited the time of the registration of deeds to two years. The Connor Act (Acts 1885, Chap 147) amended this section of the Code by requiring that all deeds, etc., shall only be good against creditors and purchasers for a valuable consideration from the time of registration. Its object was to protect creditors and innocent purchasers for value.—*Hallyburton v Slagle* 130 NC 482, 41 SE 877.

519. **Is an unregistered deed good against a subsequent purchaser without notice of such prior conveyance?**

A. No, unless executed prior to 1885. In the absence of fraud there is no notice except that of registration.—*Tremaine v Williams* 144 NC 114, 56 SE 694.

520. What is the effect if one receives and registers a deed for a valid consideration and with full knowledge of a prior conveyance unregistered, for value, for the same land outstanding in the hands of another?

A. The first deed registered conveys the land.—*Tremaine v Williams*, *supra*.

CONSTRUCTION AND OPERATION.

521. What are the rules laid down by Blackstone and other authorities for the construction of wills and deeds?

A. 1. The construction must be favorable, and as near the minds and apparent intent of the parties as the rules of law will admit.

2. Where there is an ambiguity in words, they shall be construed according to their obvious meaning. Bad grammar does not vitiate.

3. Construction must be placed upon the entire deed, and not merely upon disjoined parts of it.

4. A deed is taken most strongly against him that is agent or contractor, and in favor of the other party.

5. If words will bear two senses, one agreeable to and the other contrary to law, the one must be taken that is agreeable to law.

6. In deeds if there are two clauses that are totally repugnant to each other, the first shall stand, in wills the last.

7. A devise must be most favorably expounded, to pursue, if possible, the will of the deviser.—II Black 379.

522. How do the modern rules for the construction of deeds differ from the rules which obtained at common law?

A. They are more liberal in giving effect to the intention of the parties.—*Real Estate Co v Bland* 152 NC 225, 67 SE 483.

523. When there are two descriptions of one tract of land in the same deed, one general and the other specific and particular, which controls?

A. The particular description controls.—*Potter v Bonner* 174 NC 20, 93 SE 370.

524. State the rule in Shelly's case.

A. Where any ancestor by any gift or conveyance taketh an estate of freehold, and in this gift or conveyance an estate is limited, either mediately or immediately, to his heirs, in

fee, or in tail, the word "heirs" is a word of limitation of the estate and not words of purchase.—*Starnes v Hill* 112 NC 1, 16 SE 1011; *King v Stokes* 125 NC 514, 34 SE 641.

525. **Is this rule in force in North Carolina?**

A. Yes.—*Starnes v Hill*, *supra*.

526. **What is a good rule by which to determine the application of the rule in Shelly's case?**

A. If, at the death of the ancestor, the estate would vest under the instrument in the same persons in whom the law would otherwise vest the same, then the ancestor takes a fee simple; otherwise simply a life estate.—*Cotton v Mosley* 159 NC 1, 74 SE 454.

527. **On June 10, 1885, A conveys a tract of land to B by metes and bounds using the following language in the Habendum and Tenendum clauses: "To have and to hold to B forever," etc. What estate does B take under the law of this state? If the deed had been made on June 1, 1878, what estate would B take? Why the difference, if any?**

A. Deed made in 1885 conveys a fee simple estate. If made in 1878 it would convey only life estate. The difference is caused by the statute of 1879 making the word "heirs" not necessary to create a fee simple.—*Boggan v Somers* 152 NC 390.

DESCENT AND DISTRIBUTION

528. **In the early common law, what became of a man's property if he died intestate?**

A. The king was entitled to it as *parens patriæ*.—*Schuler's Executors* 11.

529. **Give the canons of descent. (Common law.)**

A. 1. Inheritances shall lineally descend to the issue of the person who last died actually siezed in *infinitum*; but shall never lineally ascend.

2. Male issues shall be admitted before the females.

3. Where there are two or more males in equal degree, the eldest only shall inherit, but the females altogether.

4. Lineal descendants in *infinitum* of any person deceased shall represent their ancestor; that is, stand in the same place as the person himself would have done had he been living.

5. On failure of lineal descendants or issue, of the person

last seized, the inheritance shall descend to his collateral relations, being the blood of the first purchaser, subject to the three preceding rules.

6. The collateral heir of the person last seized must be his next collateral kinsman of the whole blood.

7. In collateral inheritances the male stocks shall be preferred to the female (that is, kindred derived from the blood of the male ancestors, however remote, shall be admitted before those from the blood of the female, however near) unless where the lands have, in fact, descended from the female.

530. In case of intestacy, what disposition is made by our laws as to the real and personal property of the intestate?

A. Real property goes to the heirs, personal property goes to the administrator and then to those that the statute provides.—Con Stat 137, 1654.

531. Give the canons of descent. (North Carolina.)

A. 1. Estate shall descend to issue of person last seized; may ascend in certain cases. (Rule 1.)

2. Females inherit equally with the males, and the younger with the older children. (Rule 2.)

3. Lineal descendants represent ancestors, and take what he would have if living. (Rule 3.)

4. On failure of lineal descendants, estate descends to collateral kinsmen, who, in case of estates transmitted from ancestor, must be blood of the first purchaser; in case there is no issue capable of inheriting, nor brother nor sister nor issue of such, the father or mother, or both if living, may take, regardless of how estate was acquired. (Rules 4, 5, 6.)

5. Half-bloods inherit equally with the whole. (Rule 6.)

6. Persons born within forty weeks after the death of intestate may inherit. (Rule 7.)

7. Illegitimate children inherit from the mother except where estate was conveyed to the mother by father of legitimate children, and inherit from each other as if legitimate. (Rules 9, 10.)—Con Stat 1654.

532. If an estate is granted to A for the life of B and A dies before B, who takes the estate?

A. The heirs of A.—Con Stat 1654 Rule 11; *Brown v Brown* 168 NC 4, 84 SE 25.

533. How are the estates of intestates distributed?

A. The surplus of the estate, in case of intestacy, shall be distributed in the following manner, except as hereinafter provided:

1. If there are more than two children, one-third part to the widow of the intestate, and all the residue by equal portions to and among the children of the intestate, and such persons as legally represent such children as may then be dead.

2. If there are more than two children, then the widow shall share equally with all the children and be entitled to a child's part.

3. If there be no child nor legal representative of a deceased child, then one-half of the estate shall be allotted to the widow, and the residue be distributed equally to every of the next of kin of the intestate, who are in equal degree, and to those who legally represent them.

4. If there be no widow, the estate shall be distributed by equal portions among all the children, and such persons as legally represent such children as may be dead.

5. If there be neither widow nor children, nor any legal representative of the children, the estate shall be distributed equally to every of the next of kin of the intestate, who are in equal degree, and those who legally represent them.

6. If in the lifetime of its father and mother a child shall die intestate, without leaving husband, wife or child, or the issue of a child, its personal property shall be equally divided between said father and mother. If one of the said parents should be dead at the time of the death of such child, the surviving parent shall be entitled to the whole of the said personal property; provided, the terms "father" and "mother" herein used shall not apply to a step-parent, but shall apply to a parent by adoption.

7. If there be no child nor legal representative of a deceased child, nor any of the next of kin of the intestate, then the widow, if there be one, shall be entitled to all the personal estate of such intestate.

8. If any married woman die intestate leaving one child and a husband, her personal estate shall be equally divided between the child and husband. If she leaves more than one child and a husband, her personal estate shall be divided in equal portions and the husband shall receive a child's part.—Con Stat 137.

534. A is the owner of certain personal property and of two tracts of land, one of which he inherited from his mother and the other he purchased. He has never married and

he dies intestate, leaving surviving, a father, one brother of the whole-blood and one brother of the half-blood, the latter having the same father as the deceased, but not the same mother. What are the rights of the father, brother of the whole-blood and brother of the half-blood, respectively, in the personal and real property?

A. The personal property would go to the father. Tract of land inherited from mother would descend to brother of the whole-blood. Tract of land purchased would be divided between the two brothers.—Con Stat 137, 1654.

535. If a legatee should die before the testator, what would become of the legacy bequeathed in the will?

A. At common law it would lapse, but under our statute if the legatee is child or other issue of the deceased, the legacy would go to the issue of such legatee.—Con Stat 4168.

536. On the death of the wife intestate, who will take her personal estate?

A. If there are no children, husband takes personal estate; if there are children, husband takes an equal share with the children.—Con Stat 7, 137.

DIVORCE

537. How many kinds of divorce are allowed in North Carolina, what are they, and what are the essential differences between them?

A. Two kinds are allowed, a *vinculo* and a *mansa et thoro*. The chief difference is that a divorce *a mensa* prohibits the parties from marrying again, and in a *vinculo* they can.—Con Stat 1659, 1660, 1663.

538. What are the grounds for each kind?

A. Marriages may be dissolved and the parties thereto divorced from the bonds of matrimony, on application of the party injured, made as by law provided, in the following cases:

1. If the husband shall commit adultery.
2. If the wife shall commit adultery.
3. If either party at the time of marriage was and still is naturally impotent.
4. If the wife at the time of marriage be pregnant, and the husband be ignorant of the fact of such pregnancy and be not the father of the child with which the wife was pregnant at the time of the marriage.

5. If there shall have been a separation of husband and wife, and they shall have lived separate and apart for ten successive years, and the plaintiff in the suit for divorce shall have resided in this state for that period, and no children be born after the marriage and living.—Con Stat 1659.

The Superior Court may grant divorces from bed and board on application of the party injured, made as by law provided in the following cases:

1. If either party shall abandon his or her family; or
2. Shall maliciously turn the other out of doors; or
3. Shall, by cruel and barbarous treatment endanger the life of the other; or
4. Shall offer such indignities to the person of the other as to render his or her condition intolerable and life burdensome; or
5. Shall become an habitual drunkard.—Con Stat 1660.

539. What is the difference, if any, which still subsists in regard to the grounds for divorce as to the wife and as to the husband?

A. Grounds for divorce are identical for either party as to divorce from bed and board. They are the same for either party as to absolute divorce, except the husband may get an absolute divorce from the wife if she be pregnant at the time of the marriage and the husband was ignorant of the fact of such pregnancy.—Con Stat 1659, 1660.

540. In an action for divorce or alimony, what are the essential contents of the affidavit plaintiff must file with the complaint in order to give jurisdiction to the court?

A. 1. That the facts set forth in the complaint are true to the best of affiant's knowledge and belief.

2. That the said complaint is not made out of levity or by collusion between husband and wife.

3. If for divorce, not for the mere purpose of being free and separated from each other but in sincerity and truth for the causes mentioned in the complaint.

4. That the facts set forth in the complaint as grounds for divorce have existed to his or her knowledge, at least six months prior to the filing of the complaint.

5. That complainant has been a resident of the state for two years next preceding the filing of the complaint.

6. If the wife be the plaintiff, that the husband is removing or about to remove his property and effects from the state, whereby she may be disappointed in her alimony.—Con Stat 1661.

541. In an action for divorce can the parties confess judgment or waive a jury in any other manner?

A. No.—Con Stat 1662.

542. What is alimony?

A. The allowance made to a wife out of her husband's estate for her support, either during matrimonial suit or at its termination, when she proves herself entitled to a separation, and the fact of marriage is established.—Black's Law Dict.

543. By whom is the amount of alimony fixed, by the judge or the jury? Is the amount subject to review on appeal? Can it be increased or diminished by another Superior Court judge on motion?

A. The amount of alimony is fixed by the judge. The Supreme Court will not interfere with the discretion of the lower court in fixing the amount of alimony unless such discretion has been abused. Can be increased or decreased at the discretion of the court.—Gordon v Gordon 88 NC 45; Crews v Crews 175 NC 168, 95 SE 149.

544. What are the effects—consequences—of a divorce a vinculo on the property rights of the parties?

A. All rights in the property by reason of the marriage relation cease.—Con Stat 2522.

545. What is the effect of an absolute divorce on the holders of an estate by the entirety in reference to their property rights?

A. Question 546.

546. Husband and wife are seized of an estate by the entirety in land, and the husband having secured a divorce remarries. He then dies, his divorced wife and his second wife surviving him. What are the rights, if any, of such survivors, and the husband's heirs in the land? State your reason.

A. Divorce of wife from husband results in vesting in her her moiety, making divorced wife and husband tenants in common. Second wife has right to have her dower allotted in husband's share.—21 Cyc 1201; McKimmon v Caulk 170 NC 54, 86 SE 809.

DOWER

NATURE AND REQUISITES, 547.

RIGHTS AND REMEDIES OF WIDOW, 556.

NATURE AND REQUISITES.

547. What is an estate in dower; of what property was a woman endowed at common law; of what under our present statute law; and what three things are necessary to create dower?

A. It is the right of the widow to one-third of all the lands to which her husband was seized during coverture. At common law she was endowed of one-third of all the lands of which her husband was seized during coverture. Under our statute she is entitled to one-third in value of all the land which her husband was entitled to seizin during coverture, whether legal or equitable estate.—II Black 129; Con Stat 4099, 4100; Barnes v Raper 90 NC 189.

Requisites:

1. Valid marriage.
2. Seizin of husband—now right to seizin.
3. Death of husband.—II Black 130.

548. What was the dower right in this state from 1784 down to 1868, and what change was made by the statute in that year? Or was the change made by the Constitution?

A. The acts in 1784 provided that the widow “shall be entitled to dower in the following manner, to-wit, one-third part of all the lands and tenements and hereditaments of which her husband died seized or possessed.”—Acts 1784 Ch 22.

The Acts of 1868 provide that “Every married woman shall be entitled to one-third interest in value of all the lands, tenements and hereditaments whereof her husband is or may be seized and possessed at any time during coverture.”—Acts 1868 Ch 93 Sec 33.

The Acts of 1868 restored to widows the common law right of dower. This change was made by statute and not by the Constitution.

549. What are the distinguishing requisites between dower and curtesy?

A. In curtesy there must be an issue born alive capable of inheriting. In dower this is not so, but widow is entitled to dower of all lands that might have been inherited by her is-

sue by her husband from whom she takes dower, whether they are born or not. Husband gets all of lands of wife in curtesy, but wife gets only one-third in dower.—II Black 126-129.

550. How is dower generally allotted in North Carolina?

A. Allotted by special proceedings before Clerk of the Superior Court.—Con Stat 4105-4107.

551. Under our statute, if A, owning several tracts of land, dies leaving a widow, must the dower be allotted on each tract or can the dower be allotted on one or more tracts?

A. One or more, including the dwelling.—Con Stat 4100.

552. What was a jointure, and in lieu of what estate was it created?

A. A competent livelihood or freehold for the wife of lands and tenements to take effect in profit and possession presently after the death of her husband, for the life of the donor at least. It was created to take the place of dower.—II Black 137.

553. An estate to A and the heirs of his body, and if he dies without such heirs, then to B and his heirs. A dies without such heirs leaving a widow. Is she entitled to dower?

A. No.—Thompson v Crump 138 NC 32, 50 SE 457.

554. Can a widow have a dower in an equity of redemption?

A. Yes.—Black's Law Dict; Con Stat 4100.

555. What will forfeit the right of dower?

- A. 1. Quitclaim deed for dower.—Con Stat 2516.
2. Joining in husband's deed.—Con Stat 4102.
3. Separation and adultery.—Con Stat 4099.
4. Convicted of murder of husband.—Con Stat 4099.
5. Divorce a mensa et thoro.—Con Stat 2523.
6. Desertion of husband.—Con Stat 2523.
7. Divorce a vineulo.—Con Stat 2522.

RIGHTS AND REMEDIES OF WIDOW.

556. Give an illustration of the maxim "dos de dote peti non debet."

A. "Dower ought not to be demanded of dower." A dies leaving his widow B and son C. Dower is allotted to B. C

marries D and dies during the lifetime of B. D does not get dower in the land allotted to B.—14 Cyc 908; Rietzel v Eckhard 65 NC 673.

557. **An estate to A for life, remainder to B for life, remainder to the heirs of A. A dies in the lifetime of B. Is his widow entitled to dower? Would it make any difference if B had died before A? Give reasons for your answer.**

A. Widow cannot take dower because the estate vests in B upon A's death. If B had died first, she would have her dower, as A would then have the whole estate by the rule in Shelly's case.—Tompson v Crump 138 NC 32, 50 SE 457.

558. **Is the widow of the vendee in possession, without a deed, and with a part of the purchase money unpaid, entitled to dower?**

A. She can have her dower laid off in the land, the remaining two-thirds may then be sold to pay the balance due of the purchase money. If the proceeds of sale are not sufficient then the remainder in fee after the dower must be sold, and the proceeds applied in the same manner. If a balance still remains due on said debt, then, and then only can the dower be subjected thereto.—Overton v Hinton 122 NC 1, 31 SE 285.

559. **Will the widow be compelled to elect between dower and the provisions made for her in her husband's will? If so, when?**

A. Yes, within six months after the will is probated.—Con Stat 4096.

560. **In case one dies intestate, leaving a widow, and owning one piece of real estate, a small lot and his dwelling situate thereon, how will the dower be assigned?**

A. She would be entitled to a life estate in one-third in value of such dwelling and lot and no more.—Caudle v Caudle 176 NC 537, 97 SE 472.

561. **A dies seized of certain lands which descended to his son subject to the dower of his mother. Dower is assigned to her in the premises. The son dies during the continuance of her estate. To what dower will the widow of the son be entitled?**

A. To one-third of the two-thirds in the possession of the son at the time of his death.—14 Cyc 908; Reitzel v Echard 65 NC 673.

562. If A owning several tracts of land, sells or conveys one or more of the tracts during coverture without joinder of the wife, but retaining land in kind and quantity sufficient for the allotment of dower, can the purchaser compel such allotment out of the property which he retains, and which descended to the heirs?

A. Must be allotted out of the property retained.—Harrington v Harrington 142 NC 517, 55 SE 409.

563. Is the widow of a mortgagor entitled to dower out of the mortgaged estate?

A. Yes, if enough left to pay the mortgage after allotting the dower.—Con Stat 4100.

564. In case a married woman is guilty of, or accessory to, the murder of her husband, can she have dower and year's provisions in the estate?

A. No.—Con Stat 10.

EASEMENTS

565. What is an easement, and how may it be acquired? Give an instance.

A. A right in the owner of one parcel of land, by reason of such ownership, to use the land of another for a special purpose not inconsistent with the general property in the owner.—Black's Law Dict.

566. What is the difference between a license and an easement?

A. A license is a privilege to do an act upon the lands of another, while an easement signifies a property in the land of another.—Black's Law Dict; Elizabeth City v Bank 150 NC 407, 64 SE 189.

A mere license (unless coupled with an interest) is personal, can not be assigned, and dies with licensee. An easement, being a species of property, is assignable.

EJECTMENT

567. What are the several steps or stages requisite to prove title to recover in an action for ejectment?

A. To show title out of the state unless both parties claim under the same person. To show title in plaintiff. To show possession in defendant.—Mobley v Griffin 104 NC 112, 10 SE 142.

568. Can the holder of an equitable title recover possession in ejectment when the legal title is outstanding in another who is not a party to the action?

A. Yes.—Shannon v Lamb 126 NC 38 (47), 35 SE 232.

569. A conveys land to B and afterwards to C who takes possession thereof, title being out of the state. B then sues C for his possession. Can he recover? What is the rule in such cases?

A. B cannot recover if C was purchaser for value and had deed registered first, or if he can show open, notorious, continuous, adverse possession for seven years.—Tremaine v Williams 144 NC 114, 56 SE 694.

EMBRACERY

570. What is embracery?

A. Embracery is an attempt to corrupt, or influence or instruct a jury, or in any way to incline them to be more favorable to the one side than to the other, by money, promise, letters, threats or persuasions, except only by the strength of the evidence and the arguments of counsel in open court.—State v Brown 95 NC 685.

EMINENT DOMAIN

571. What is the power of eminent domain, and give an illustration of its exercise?

A. Eminent domain is the right of the people or government to take private property for public use.—Black's Law Dict.

Taking the land of an individual for the right of way for a railroad is an example of the exercise of this right.

572. Upon whom may the General Assembly confer the right to condemn private property and upon what terms?

A. The General Assembly may confer the right to condemn private property to public or private corporations for the public use, and in some cases, to individuals. It can only be taken for public use and upon just compensation.—Bass v Navigation Co 111 NC 439, 16 SE 402; Barrington v Ferry Co 69 NC 165; RR v Davis 19 NC 411; See Questions 571, 574, 575.

573. **Can Congress confer the right to be exercised within a state, and if so, what is the limitation of its powers in this respect?**

A. Yes.—Kohl v US 91 US 367, 23 L Ed 449.

This power is limited by the last clause of the fifth Amendment of the United States Constitution, which states, "Nor shall private property be taken for public use, without just compensation."

574. **By whom and under what circumstances can this right be exercised?**

A. It can be exercised only upon the authority of the state directly or indirectly, and it can be taken only for the public use and upon just compensation.—Phillips v Tel Co 130 NC 513, 41 SE 1022; Liegh v Mfg Co 132 NC 167, 43 SE 632.

575. **Does the right of the state to take private property for public use under the form of eminent domain upon making compensation to the owner, extend to the property of a corporation as well as to the property of an individual?**

A. Yes.—Clark on Corps 211; RR v Mfg Co 166 NC 168, 82 SE 5.

576. **Suppose A executes a deed to a railroad corporation in fee simple, does that confer any greater right than the corporation could have acquired by condemnation?**

A. Yes. Under fee simple deed, the railroad would hold the land just as an individual in fee, but under condemnation proceeding, the estate which the railroad would acquire would amount to only an easement.—RR v Sturgeon 120 NC 225, 27 SE 1007.

EQUITY

JURISDICTION, PRINCIPALS AND MAXIMS, 583.

PARTIES AND PROCESS, 598.

577. **What is equity?**

A. It is a system devised for "the correction of that wherein the law (by reason of its universality) is deficient." —I Black 61.

578. **What is the meaning of the word "equity" in its technical sense in English jurisprudence?**

A. It is a term of description of a certain field of jurisdiction, exercised, in the English system, by certain courts and of which the extent and boundaries are not marked by

lines founded upon principles so much as by the features of the original constitution of the English scheme of remedial law, and the accidents of its development.—Bispham's Equity Sec 11.

579. Is equity regarded as a distinct branch of jurisdiction in this state?

A. No. Distinction between actions at law and suits in equity now abolished.—NC Const Art IV Sec 1.

580. What are the general grounds for equitable relief?

A. That there is no remedy at law, or if one, that it is inadequate.—Bispham's Equity Sec 8.

581. What were the two principal cases of the inadequacy of the common law that originated equity jurisdiction?

A. Where the common law courts could not enforce the right. Where the common law courts did not administer the remedy.

582. Give an illustration of a case where the law recognizes a right, but equity alone can enforce it.

A. A agrees to sell a tract of land to B by contract binding at law. The law recognizes B's right but cannot compel A to make a deed. Here equity will enforce specific performance.—Con Stat 607, 609.

JURISDICTION, PRINCIPALS AND MAXIMS.

583. By what courts was equity administered?

A. See Question 584.

584. Why and how did the Chancery Courts grow into being in England?

A. In the foundation of the system of jurisprudence certain courts were organized and given jurisdiction over certain matters, but their rules of procedure and the matters of which they had jurisdiction were fixed by hard and fast rules, so both on account of the want of jurisdiction and on account of the inelasticity of their forms, many wrongs could be remedied only by application to the sovereign, and when they became too numerous he was forced to commit them to his chancellor.—Bispham's Equity Chap 1.

585. When and by what provisions of law was the present equity system established?

A. By the Constitution of 1868, Art IV Sec 1.

586. What are the three general heads of chancery jurisdiction?

A. 1. Those cases in which common law courts do not recognize a title or equitable titles.

2. Those cases in which common law courts do not recognize a right or equitable rights.

3. Those cases in which common law courts can not enforce a right, or cannot enforce it so as to give complete justice or equitable remedies.—Bispham's Equity Sec 16.

587. Why was equitable relief not administered and enforced in common law courts?

A. Common law courts must proceed according to fixed forms and have no remedy except by damages only in the cases of detinue and replevin. Consequently, in some cases they could give no relief, and in others the remedy was inadequate.—Adam's Equity 29.

588. In what important respect does the exercise of equity practice differ in the courts of North Carolina and in the Federal Courts?

A. All rights both legal and equitable, are enforceable by the same form of action in the state courts, but in the Federal Courts suits in equity are separate and distinct from actions at law.—Bispham's Equity Sec 13; NC Const Art IV Sec 1.

589. How and in what courts are the principles of equity now applied and enforced in this state?

A. By civil action, governed by the same rules as formerly. Certain matters are by statute placed within the jurisdiction of the Clerk of the Superior Court, but in the absence of any statutory provision, the jurisdiction is in the Superior Court at term.—Con Stat 384; Banking Co v Morehead 116 NC 410 (413), 32 SE 388.

590. What is the nature of the equitable jurisdiction of the Federal Courts, and how is equity administered in these courts, and who prescribes the Federal rules in equity?

A. "Only such equity powers can be exercised by the United States courts as may be conferred by Act of congress, and those judicial powers which were possessed and exercised by the High Court of Chancery in England under its judicial capacity as a court of equity at the time of the formation of the United States Constitution. And the equity powers of the Federal Courts are declared to be co-eval and co-exten-

sive with those of such court as to rights and remedies within the limits of their constitutional jurisdiction.”—11 Cyc 846. Equity is administered in those courts according to rules laid down by the Supreme Court of the United States.

591. In what three classes are the subjects or heads of equity jurisdiction divided?

- A. 1. Equitable titles.
- 2. Equitable rights.
- 3. Equitable remedies.—Bispham’s Equity Sec 16.

592. Between equal equities the law will prevail, and between those which are unequal the superior equity will prevail, but by what three rules may superiority be acquired (or determined) as between unequal equities?

A. 1. The equity under a trust or contract in rem is superior to that of a voluntary gift, or under a lien by judgment.

2. The equity of a party who has been misled is superior to that of the party who has misled him.

3. A party taking with notice of an equity takes subject to that equity.—Adam’s Equity 148.

593. How many maxims are there in equity by which the general principles of chancery jurisdiction are applied and expressed?

A. Bispham gives twelve:

- 1. Equity will not suffer a right to be without a remedy.
- 2. Equity follows the law.
- 3. Equity aids the vigilant and not those who sleep on their rights.
- 4. Between equal equities the law will prevail.
- 5. Equality is equity.
- 6. He who comes into equity must do so with clean hands.
- 7. He who seeks equity must do equity.
- 8. Equity looks upon that as done which ought to be done.
- 9. Between equal equities priority of time will prevail.
- 10. Equity imputes an intention to fulfill an obligation.
- 11. Equity acts in personam.
- 12. Equity acts specifically.—Bispham’s Equity Chapter III.

594. What maxim of equity does Bispham say lies at the foundation of many of the doctrines of equity?

A. Equity will not suffer a right to be without a remedy.—Bispham’s Equity Sec. 37.

595. **What is the difference between contribution, exoneration and marshalling? Give example of each.**

A. Contribution arises where one of several parties who are liable for a common debt or obligation, discharges the same for the benefit of all. A, B and C are jointly liable for a debt which B pays. B has the right from A and C for them each to repay him their respective shares.

Exoneration is the right of a person secondarily liable for a debt to call upon the person primarily liable to discharge it, or to repay him if he has paid it. A is surety of a debt of B's, which A pays. A has the right of exoneration from B.

Marshalling grows out of the principle that a party having two funds out of which to satisfy his debt shall not, by his election disappoint a person having only one. A owes B and C each \$1,000. B holds two mortgages, one on the personal, and one on the real property of A with which to secure his debt. C has a mortgage on the real property of A with which to secure his debt. B can not elect to foreclose the mortgage on the real property of A in prejudice to C.—Bispham's Equity Sec 326 et seq.

596. **What equities are discussed under Bispham's Principles of Equity under the head of adjustments?**

A. Set-off, contribution, exoneration, subrogation, and marshalling.—Bispham's Equity Sec 326.

597. **Did the right of set-off exist at common law?**

A. No, but was enforced in courts of equity. It was allowed by statute 254 Anne, and further enlarged by 228 George III.—*Electric Co v Williams* 123 NC 51, 31 SE 288.

PARTIES AND PROCESS.

598. **How was a suit in equity begun, and what was its principal purpose?**

A. It was begun by original bill, and the purpose of equity was to grant relief where there was no remedy at law or, where there was one, it was inadequate.—Bispham's Equity Sec 9; *Staton v Webb* 137 NC 35, 49 SE 55.

599. **What was the original process in the English Chancery Courts, and who was its reputed author?**

A. The original process was the subpoena, whose supposed author was Sir John de Waltham.—Bispham's Equity Sec 9.

600. By what process did the courts obtain jurisdiction of a case, and how did it usually enforce its decree?

A. Obtained jurisdiction by subpoena. Enforced by proceedings for contempt.—Bispham's Equity Sec 9.

601. How was a suit in equity commenced?

A. Suit was commenced by original bill.—Bispham's Equity Sec 9.

ESCROW

602. What is an escrow?

A. A deed delivered by a grantor into the hands of a third person, to be held by the latter until the happening of a contingency or performance of the condition and then by him delivered to the grantee.—Black's Law Diet.

603. When does the title pass from the grantor to the grantee?

A. It does not pass title until delivered. But when delivered to grantee it vests as of the same time as the delivery of the escrow.—II Black 307; Hall v Harris 40 NC 303.

ESTATES

604. What is the origin of the land laws in England, and when was the system introduced?

A. The land laws of England originated in the feudal system which was introduced into England from the continent in the year 1066.—II Black 45 et seq.

605. What was the feudal system, what was its origin, and by whom was it introduced into England?

A. The feudal system of England had its origin in the military policy of the Celtic nations, having been brought by them from the countries from which they migrated. By it the title to all land was in the king, who leased it to the tenants in capita, they sub-letting it in turn to the other tenants. For the lease of the land, the tenant rendered military or other services to his lord, its purpose having been the establishment of a strong military system. It was introduced into England by William the Conqueror soon after his victory at Hastings, in the year 1066.—II Black 45 et seq.

606. What is meant by tenure and what is the tenure of free and common socage?

A. Tenure is the mode or system of holding lands or tenements in subordination to some superior, which in the feudal age was the leading characteristic of real property.

Free and common socage was the system by which lands were held in England by rendering services, both honorable, as distinguished from villein socage, and certain as distinguished from knight service, etc.—II Black 78 et seq.

607. What is included in the term "land"?

A. All things of a permanent and substantial nature and any ground, soil, or earth whatsoever.

It includes not only the face of the earth, but everything under it and over it and has in its legal signification an indefinite extent upward and downward. *Cujus est solum, ejus usque ad coelum*.—II Black 17, 19.

608. What is real property?

A. "Things real are such as are permanent, fixed and immovable which cannot be carried out of their place; as lands and tenements; things personal are goods, moneys and all other movables; which may attend the owner's person wherever he thinks proper to go."—II Black 15.

609. What was the fundamental maxim of feudal tenures?

A. That all land was held either mediately or immediately of the king.—II Black 59, 60.

610. By what tenures were lands originally granted and held in North Carolina? How are they held since the separation from England?

A. Originally held by free and common socage. It is said that we now hold by a species of feudal tenure, all being tenants in capite.

611. What was the statute 12 Car 11 (1660), and what was its effect upon feudal tenures?

A. Its purpose was to abolish the military tenures with all their heavy appendages, and it abolished all such tenures except frankalmoign, copyhold and honorary services (without the slavish part) of grand serjeantry.—II Black 77.

612. What is the distinction between quantity and quality of an estate?

A. Quantity refers to the extent of its continuance, whether in fee, for life, years, etc.—II Black Chap 7.

Quality refers to the manner in which held, whether upon condition, absolutely, in severalty, or in common.—II Black Chap 12.

613. What is an incorporeal hereditament? How many kinds, and what are they?

A. It is a right issuing out of a thing corporate, whether real or personal, or concerning or annexed to or exercisable within the same. They are ten in number:

ADVOWSONS; the right of presentation to a church or benefice.

TITHES; the tenth part of the yearly increase arising and renewing from the profits of the land, etc.

COMMONS; a right or profit which one has in the lands of another.

WAYS; the right of passing over the lands of another.

OFFICES; the right of exercising a public employment.

CORODIES; the allotment to provisions for one's sustenance.

ANNUITY; a yearly sum of money charged upon the person of another.

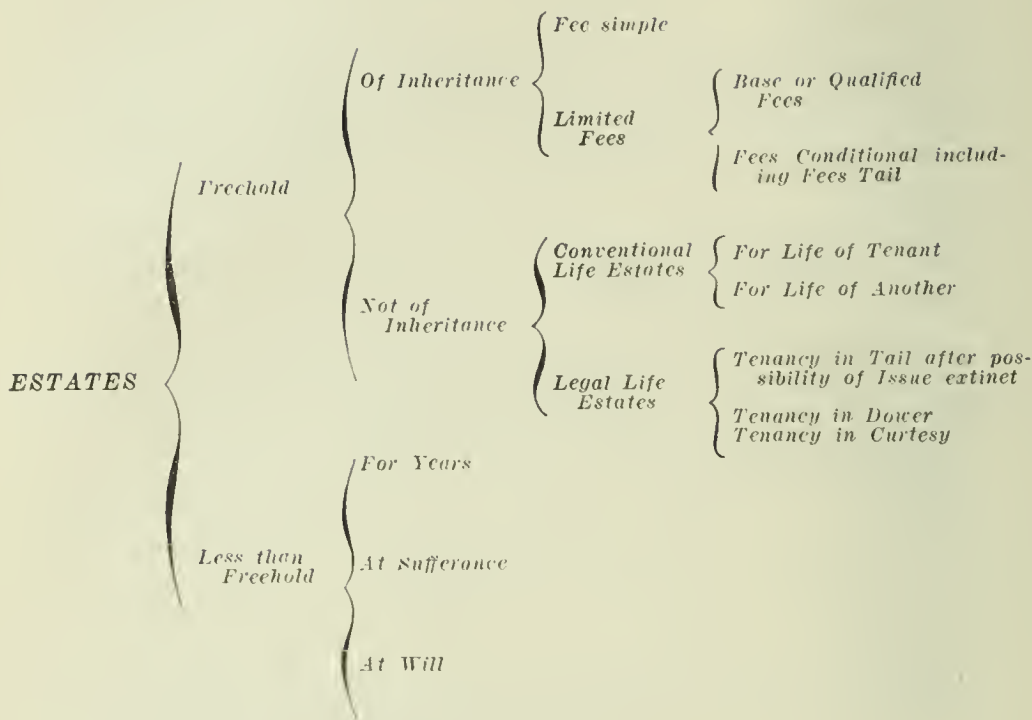
RENTS; the profits issuing yearly out of the lands and tenements corporeal of another.

DIGNITIES; titles to honor.

FRANCHISES; royal privileges.—II Black 20.

614. How are estates divided in respect to their duration?

A. Into freeholds and those less than freeholds. Freeholds are freeholds of inheritance and not of inheritance. Freeholds of inheritance are fee-simple and limited fees, limited fees embracing base or qualified fees, and fees conditional at common law from which latter the statute de donis came estates tail. Freeholds not of inheritance are conventional life estates, and legal life estates. Estates less than freehold are for years, at will and at sufferance.—II Black Chap 7.



615. What is a freehold estate?

A. "Such estate therefore and no other, as requires actual possession of the land, is, legally speaking, **freehold**; which actual possession can, by the course of the common law, be only given by the ceremony called livery of seizin."—II Black 104.

616. When may the fee be in abeyance?

A. When there is no person at present in whom it can vest.—II Black 107.

617. What is the highest estate in real property, and is the use of the word "heirs" necessary to its creation?

A. Fee-simple is the largest, and the use of the word "heirs" is not now necessary.—II Black 107; Con Stat 991.

618. What is considered the highest estate, and at common law, what words were necessary to create it?

A. See Question 617. The word "heirs" was necessary to its creation at common law, but this requirement was removed by Act of 1879, Chapter 148, as to deeds, and as to wills in 1784.—Vickeys v Leigh 104 NC 248 (257), 10 SE 308.

619. By what statute were estates tail converted into fee-simple in North Carolina?

A. By Acts 1784.—Con Stat 1734.

620. What is a base or qualified fee?

A. It is an estate with a condition attached by which it may be defeated, as an estate to A and his heirs tenants of the manor of Dale.—II Black 109.

Note: A base or qualified fee is one which has a qualification subjoined thereto and which must be determined whenever the qualification annexed to it is at an end.—I Black 109. A conditional fee, at common law, was a fee restricted to some particular heirs exclusive of all others.—II Black 110.

621. What is a base or determinable fee, and how does it differ from a conditional limitation?

A. A base fee is one which has a qualification or condition attached by which it may be defeated. A conditional limitation is a condition, followed by a limitation over to a third party in case the condition be not fulfilled.

In a base fee the estate is at an end when the condition is broken. In a conditional limitation, when the condition is broken the estate vests in a third person.—II Black 109; Spring v Hopkins 171 NC 486, 88 SE 774.

622. For what purpose was the statute Westminster Second passed (statute de donis conditionalibus), and what estate originated from it?

A. To prevent the ancestor in conveyances made to him and the heirs of his body from conveying such estate. Estates tail originated from it.—II Black 112.

623. At common law could an estate tail be directly created in a personal chattel, and give reasons for such answer.

A. No, as this would tend to perpetuities.—II Black 398.

624. Define an estate tail after possibility of issue extinct.

A. It was an estate occurring where one tenant in special tail (estate tail limited to the heirs of two particular parents) from whose body the issue was to spring, dies without leaving issue, or having left issue that issue becomes extinct.—II Black 124.

625. What is the difference between a legal and a conventional estate?

A. Conventional estate arises by an act of the parties. Legal estate arises by operation of law.—II Black 120.

626. Suppose North Carolina land is devised to A and upon the event of A's death without children, then to others, what estate would A take?

A. A fee defeasable upon his dying without children.—Whitefield v Garriss 134 NC 24, 45 SE 904.

627. Define an estate upon condition.

A. It is an estate whose existence depends upon the happening or not happening of some uncertain event, whereby the estate may be originally created or enlarged or finally defeated.—II Black 152.

628. How are conditions classified?

A. Conditions are either express or implied; precedent or subsequent.—II Black 152, 154.

629. How may an estate upon condition subsequent be terminated and by whom?

A. Upon failure to comply with the conditions of the grantor.—II Black 155.

630. What is the difference between a condition precedent and a condition subsequent?

A. A condition precedent is one that must be performed before the estate can vest; a condition subsequent is one which the estate already created may be divested or otherwise changed or defeated. An estate to A to vest upon his marriage to B is a condition precedent. An estate to A to remain his so long as it is used for educational purposes is a condition subsequent.—II Black 154.

631. What is a conditional fee? Give example.

A. An estate limited to certain particular heirs, exclusive of others, as to A and the heirs of his body.—II Black 110.

632. How were conditional estates affected by the statute de donis and what new estates were created thereby?

A. By the estate de donis the grantee was prevented from alienating his estate beyond his life, thus perpetuating the estate in some particular family. If there were no particular heirs to whom the estate could descend (the particular heirs being named in the deed), it reverted to the donor. Estates tail were created by this statute.—II Black 111.

633. What is a condition invalid, and how is an estate limited upon it affected thereby?

A. If the condition be at the time impossible, or afterward becomes impossible by Act of God, or of the feeoffer, or

if it be contrary to law or repugnant to the estate, in case of conditions subsequent the condition becomes absolute, but in case of conditions precedent the estate never vests.—II Black 156.

634. What is an estate by implication or construction of law? Give an example.

A. It is one that does not arise by deed or other conveyance, but one that the law vests in the owner, as in case of a reversion. A conveys land to B for life. Upon the death of B the estate reverts to A by implication of law.—II Black 175.

635. If the condition annexed to an estate precedent or subsequent, be void, what is the legal effect upon the estate granted?

A. If the condition be subsequent, grantee takes fee simple. If the condition be precedent, the estate does not vest.—II Black 157.

636. What is the doctrine of "Acceleration" of estates and does the same apply in case of widow's dissent from her husband's will?

A. "The doctrine of acceleration by which the 'enjoyment of an expectant interest is hastened' rests upon the theory that such enjoyment having been postponed for the benefit of a preceding vested estate or interest in the destruction or determination of such preceding estate before it would regularly expire the ultimate takers should come into the present enjoyment of the property."

Applies in case of a widow's dissent from her husband's will.—Young v Harris 176 NC 631, 97 SE 609.

637. How are estates classified in respect to the time of their enjoyment?

A. Estates in possession and estates in expectancy.—II Black 163.

638. How are future estates classified?

A. REMAINDERS: A conveys land to B for life, and at B's death to C. Here C has the remainder.

REVERSIONS: A conveys land to B for life. Here the reversion is to A and his heirs.

EXECUTORY DEVISES: A by will devises an estate to B to take effect upon his becoming twenty-one years of age. Here is an executory devise.—II Black Chap 11.

639. An estate to A and the heirs of his body, and if he dies without such heirs at the time of his death, then to the heirs of B. Is the limitation over good if contained in a will and what is the proper term for it?

A. Yes, executory devise.—II Black 173.

640. An estate to A and his heirs, and if he die without heirs, then to B and his heirs: What is such an estate termed, and at common law, could the same be created by deed? Give reason.

A. Conditional limitation. Could not be created by deed, because a fee is limited after a fee, and livery of seizin was necessary in creation of freehold estate.—II Black 104.

641. Under the former law could such an estate be created by will, and what was it termed?

A. Yes, executory devise.—II Black 174; *Smith v Brisson* 90 NC 284.

642. Can such an estate be created by deed, and what statute exists with us having an important bearing on the question?

A. Yes. For statute see *Con Stat* 1737; *Smith v Brisson* 90 NC 284.

643. Is such limitation over good in a common law deed by way of livery of seizin; Give reason. (This refers to Question 639.)

A. No. Freehold could not be conveyed by deed to begin in future because livery of seizin was necessary.—II Black 173.

644. Is such limitation (Question 639) over good in a deed under our statute, and under the law as it now obtains with us? Give reason.

A. Yes, because livery of seizin is not necessary, registration having taken its place.—*Con Stat* 3308, 1737.

645. Can a fee be limited after a fee to take effect in a deed at common law, or under the statute of uses? Give the reason for your answer, and in this connection let us put a case: Land conveyed in this state to A and the heirs of his body by deed, provided that if he have no heirs at the time of his death, the land is to go to the heirs of B. Is the limitation over good? Give the reason for your answer.

A. It was not good at common law because livery of seizin was required, but the limitation over now would be good because livery of seizin is not required.—II Black 173; *Con Stat* 3308, 1737.

646. **What is the origin of the common law in respect to title of real property, and also as to personalty?**

A. Title to property originated by occupancy.—II Black 8.

647. **What is title, and what are the requisites of complete title?**

A. Title is the means whereby the owner of lands has the just possession of his property. The requisites of complete title are naked possession, right of possession and the right of property.—II Black 195-200.

648. **Name the ways in which title may be acquired.**

A. By descent and by purchase.—II Black 201.

649. **What are the different kinds of seizin?**

A. Seizin in deed and seizin in law.—II Black 315, 316.

650. **What is meant by title by prescription?**

A. It is title derived from immemorably using and enjoying property and it presupposes a grant.—II Black 263.

651. **Explain the doctrine of merger.**

A. Whenever a less right or estate and a greater vest in the same person without any intermediate estate, the less is merged into the greater.—Black's Law Dict.

652. **How may an estate be held as to the number and connection of its tenants?**

A. It may be held in severalty, in common, by entireties, and formerly by joint tenancy and co-parcenary.—II Black 179 et seq.

653. **Distinguish between estates in severalty, joint tenancy, co-parcenary and in common, giving their unities.**

A. Estate in severalty the owner is sole tenant.

Estate in joint tenancy is where lands and tenements are granted to two or more parties, unities of time, title, interest and possession.

Estate in co-parcenary is where lands and tenements descend from the same person or ancestor to two or more persons, unities of interest, title and possession.

Tenancy in common is such as hold by several and distinct titles but have unity of possession. Unity of possession only.—II Black 179-182.

654. **How may the unities be destroyed in joint tenancy?**

A. Unity of time can not be destroyed by any subsequent act; unity of possession may be destroyed by partition; unity

of title may be destroyed by one of joint tenants conveying his interest to third person; unity of interest may be destroyed by one acquiring a greater interest, as where two are joint tenants for life, and one acquires the reversion or remainder, the less estate merging into the greater, and the unity of interest thus being destroyed.—II Black 185.

655. Does joint tenancy exist in this state? If so, when?

A. Joint tenancy has not been abolished in this state, but by statute survivorship has been abolished except in cases of partnerships or other exceptions mentioned in the statute.—Con Stat 1735.

656. How may a tenancy in joint tenancy be severed and destroyed?

A. By destruction of any of its unities, or by partition.—II Black 185.

657. How are joint tenants seized?

A. They are seized *per my et per tout*.—II Black 182.

658. What is the meaning of the word "fee" in a conveyance of land?

A. It means "feud" or "fief," and in its original sense, is taken in contradistinction to allodium.—II Black 104.

ESTOPPEL

NATURE, ELEMENTS AND CLASSIFICATION, 659.

BY RECORD, 665.

BY DEED, 671.

EQUITABLE ESTOPPEL, 675.

NATURE, ELEMENTS AND CLASSIFICATION.

659. How many kinds of estoppel and what are they?

A. Estoppels may arise either by matter of record, of deed, or *in pais*.—Bispham's Equity, See 281.

660. What are the three kinds of privies bound regularly with the parties to an estoppel?

A. Privies of blood, of law, and in estate.—Bispham's Equity, See 294.

661. What is essential of estoppels to render them effective?

A. Estoppels must be mutual, must bind both parties and extend to parties only, and not to strangers.—Allred v Smith 135 NC 443, 45 SE 830.

662. What are the most common rules affecting estoppels?

A. 1. In estoppel by record, all parties to suit are estopped by judgment.

2. In estoppel by deed parties to deed are estopped as to all matters contracted or contained in the deed.

3. In estoppels **in pais**, or equitable estoppel, one party who by acts or words misled another to his hurt, is estopped to deny what he misled the other to believe.—Bispham's Equity, Sec 281.

663. What are the common law estoppels and what are the equitable?

A. Estoppel by deed and by record are common law. Estoppel **in pais** is equitable.—Bispham's Equity, Sec 281.

664. If an estoppel be relied upon as a defense, is it essential that it be pleaded?

A. Yes.—Alston v Connell 140 NC 485, 53 SE 292.

BY RECORD.

665. What is an estoppel of record?

A. An estoppel founded upon matter of record, as a confession or admission made in pleading in a court of record, which precludes the party from afterwards contesting the same fact in the same suit.—Black's Law Dict.

666. How may a defendant avail himself of an estoppel of record?

A. By pleading it with certainty and particularity.—Porter v Armstrong 134 NC 447 (455), 46 SE 997.

667. When is a judgment an estoppel as to all matters which might have been litigated in an action and when not?

A. A judgment is an estoppel upon parties and privies; but to constitute a judgment an estoppel there must be an identity of the parties as of the subject matter; that is, it is necessary that the parties, as between whom the judgment is claimed to be an estoppel, should have been parties to the action in which it is rendered, or else be in privity with the parties in such former action, and as a general rule it is conclusive only between them.—LeRoy v Steamboat Co 165 NC 109, 80 SE 984.

668. Suppose A, B and C are tenants in common, and by partition proceedings have the land divided and decrees duly entered. Afterwards C discovers that the true title is in D, and takes deed from D for valuable consideration. C then

sues A and B for the land, and they plead the estoppel of the partition proceedings. Can C recover? Give the reason for your answer.

A. No, because he is estopped by the partition proceedings.—Carter v White 134 NC 466, 46 SE 983.

669. Is there any implied warranty of title among tenants in common of land, and can one tenant in common after partition is made, set up an adverse title to the portion of another, and oust the former co-tenant from the part which had been partitioned to him?

A. There is no implied warranty of title but a tenant in common cannot set up adverse title and oust co-tenant. He cannot dispute the title under which he claimed at the time of partition.—McLawhorn v Harris 156 NC 107, 72 SE 211.

670. A brings action against B for the conversion of personal property, and judgment goes against A on the ground that he sold the property to B. Can A recover in another action for the price reserved or for any other amount, or is he estopped by former judgment?

A. Can recover for price of property. The doctrine is that an estoppel will bind parties and privies as to the matter in issue between them, but it does not conclude as to matters not involved in the issue, nor when they claim in a different right. As to the proposition contained in the first portion of this statement, it has come to be well recognized that the test of an estoppel by judgment is the identity of the issue involved in the suit.—Gillam v Edmonson 154 NC 127, 69 SE 924.

BY DEED.

671. Give an example of an estate acquired, or passing, by estoppel.

A. A, who has no title to a tract of land, conveys to B. A afterwards acquires title to the same land by deed from C. The title acquired by A from C passes to B.—Hallyburton v Slagle 132 NC 947, 44 SE 655.

672. When is a grantor of land estopped to set up an after-acquired title?

A. Whenever by deed he has attempted to convey title.—Weeks v Wilkins 139 NC 215, 51 SE 909.

673. **A sells land to B with warranty, of which he has no title but after he sells to B he acquires title. Is B benefitted by this, and if so, how, and by what rule of law?**

A. Yes, by estoppel. The latter deed feeds the estoppel.—*Zimmerman v Robinson* 114 NC 40, 19 SE 102.

674. **What is meant by feeding an estoppel? Give an example.**

A. It means that where a man sells land and warrants the title to which he has not good title, but afterwards acquires title, then he is estopped by his deed, and the after-acquired title feeds the estoppel.

A bought a lot from B who was a married woman, and her husband did not join in the deed to A. C loaned A money and took a mortgage on the lot. After the mortgage was made, B and her husband executed a valid deed to A for the lot. This last deed feeds the estoppel and makes the mortgage deed good.—*Zimmerman v Robinson* 114 NC 39, 19 SE 102.

EQUITABLE ESTOPPEL.

675. **What is the nature of an estoppel in equity?**

A. An estoppel was defined by Lord Coke to be where "A man's own act or acceptance stoppeth or closeth up his mouth to allege or plead the truth." Estoppel arises where a man allows another to believe a certain state of facts exists, and to act upon this belief so as to alter his position. He is thereby excluded from setting up a different state of facts as existing at the time.—*Bispham's Equity* Sec 280.

676. **What are the essential elements of an equitable estoppel?**

A. "1. Words or conduct by the party against whom the estoppel is alleged, amounting to misrepresentation or concealment of material facts.

"2. The party against whom the estoppel is alleged must have knowledge, either actual or implied, at the time the representations were made, that they were untrue.

"3. The trust respecting the representations so made must be unknown to the party claiming the benefit of the estoppel at the time they were made and at the time they were acted on by him.

"4. The party estopped must intend or expect that his conduct or representations will be acted on by the party asserting the estoppel, or by the public generally.

"5. The representations or conduct must have been relied and acted on by the party claiming the benefit of the estoppel.

"6. The party claiming the benefit of the estoppel must have so acted, because of such representations or conduct that he would be prejudiced if the first party be permitted to deny the truth thereof."—*Boddie v Bond* 154 NC 359 (366), 70 SE 824.

677. What is an equitable estoppel and out of what does it grow?

A. Estoppel is the agency of the law by which evidence to controvert the truth of certain undisputable admissions is excluded. It grows out of representations which, after they are made, cannot be denied, and must be adhered to by the person making them.—*Bispham's Equity* See 25.

678. What is an estoppel in pais?

A. Same as equitable estoppel.—*Bispham's Equity* See 281.

679. Give an example of an estoppel in pais.

A. Question 681 is a good example of such estoppel.—See *Boddie v Bond* 154 NC 359, 70 SE 824.

680. What is the rule as to estoppel by conduct of married women and infants?

A. They are not estopped by conduct unless the element of fraud is present.—*Weatherbee v Farrar* 97 NC 106, 1 SE 616.

681. A sells a horse to B in the presence of C who is the true owner. C remains quiet at the time, but afterwards sues B to recover the horse. Can the action be maintained? What is the equitable principle involved?

A. No. Estoppel.—*Sherrill v Sherrill* 73 NC 8.

EVIDENCE

NATURE AND SCOPE OF RULES, 685.

JUDICIAL NOTICE, 689.

PRESUMPTIONS, 691.

BURDEN OF PROOF, 697.

RELEVANCY, MATERIALITY AND COMPETENCY, 702.

BEST AND SECONDARY EVIDENCE, 706.

ADMISSIONS, 708.

DECLARATIONS, 710.

HEARSAY, 713.

PAROL OR EXTRINSIC EVIDENCE AFFECTING WRITINGS, 715.

OPINION EVIDENCE, 723.

WEIGHT AND SUFFICIENCY, 725.

682. What is evidence?

A. The means by which any alleged matter of fact, the truth or falsity of which is submitted to investigation, is established or disproved.—1 Green Ev Sec 1.

683. What is a bill in perpetuam rei memoriam, and when will it be entertained by the Court?

A. It is a bill to perpetuate testimony, and lies only when the evidence relates to legal rights which cannot be tried immediately by reason of the impediment of a prior legal title outstanding in the defendant or someone else.—Baxter v Farmer 42 NC 239.

684. In what cases is notice to produce a paper or document necessary?

A. When the paper or document is in court.—17 Cyc 459.

NATURE AND SCOPE OF RULES OF EVIDENCE.**685. What is the meaning and effect of the rule as to idem sonans?**

A. "The law does not regard the spelling of names so much as their sound. The doctrine of **idem sonans**, if two names, although spelled differently, sound alike, they are to be regarded as the same. Great latitude is allowed in the spelling and pronunciation of proper names, and in all legal proceedings, whether civil or criminal, if two names, as commonly pronounced in the English language, are sounded alike, a variance in their spelling is immaterial. Even slight differences in their pronunciation is unimportant; if the attentive ear finds difficulty in distinguishing the two names which are pronounced, they are **idem sonans**."—29 Cyc 272.

686. What are the three kinds of the instruments of evidence?

A. "The instruments of evidence are divided into two general classes, written and unwritten."—1 Green Ev Sec 307.

687. Give the four rules laid down by Greenleaf governing the production of evidence.

A. 1. The evidence must correspond with the allegations and must be confined to the point in issue.

2. It is sufficient if the substance only of the issue be proved.

3. The burden of proving an issue lies on the party holding the affirmative.

4. The best evidence of which the case, in its nature, is susceptible, must always be produced.—1 Green Ev Sec 50.

688. Under the plea of estoppel, relying upon the authority of *res adjudicata*, is the former record evidence for the consideration of the court only, or is it to be submitted to the jury upon proper instructions from the court?

A. If the record of the former trial is complete and shows what was decided upon then, it is for the court only, but if record fails to disclose the point upon which former case was decided, parol proof may be offered, and it may be submitted to the jury.—*Bryan v Malloy* 90 NC 508.

JUDICIAL NOTICE.

689. Do the courts of this state take judicial notice of the laws of another state or foreign country?

A. No.—*Hall v RR* 146 NC 345 (351), 59 SE 879.

690. In a trial where the expectancy of life is a material matter, can the expectancy as provided for in the statute be read to the jury when it is not put in evidence?

A. Yes, it being a public statute of which the courts will take judicial notice.—*Lockhart's Ev Sec 2*.

PRESUMPTIONS.

691. What is a presumption of law, and in what respects does it differ from a presumption of fact and mixed presumptions?

A. Presumptions of law are matters of law that the courts take cognizance of as true. They are rules of law, while presumptions of fact and mixed presumptions are merely degrees of probability of facts.—*I Green Ev Secs 14, 44*.

692. How do you determine whether a presumption is one of law or of fact?

A. Presumptions of law are rules of law binding upon both court and jury. Presumptions of fact are mere inferences drawn from proof of one or more facts.—*Lockhart's Ev Sec 245*.

693. Suppose A gives bond as agent of an insurance company and defaults, and the insurance company sues A and recovers judgment. Is it competent to introduce such judgment in a suit by the insurance company against the sureties on A's bond? If so, is such judgment conclusive proof of the amount of such debt as against the sureties? What is its probative force?

A. It is presumptive evidence of the correctness of the amount of the default, but may be rebutted by surety.—*Con Stat 358; McNeill v Currie* 117 NC 344, 23 SE 216.

694. **How are the laws of other states introduced as evidence in our courts?**

A. The common law of other states may be proved orally and by reports of adjudicated cases. The statute law and all proclamations, edicts, etc., may be proved by a printed or certified copy.—Con Stat 1749; *Hancock v Tel Co* 142 NC 163, 55 SE 82.

695. **A testified in a suit that he duly addressed, stamped and deposited in the post office a letter to B. What effect does the law give to such evidence, if believed?**

A. It is prima facie evidence that the letter was received by B.—*Bragaw v Supreme Lodge* 124 NC 154, 32 SE 544.

696. **What is the effect of the application of the doctrine of *res ipsa loquitur*?**

A. "The principle of *res ipsa loquitur* carries the question of negligence to the jury, not relieving the plaintiff of the burden of proof, and not raising any presumption in his favor, but simply entitling the jury in view of all the circumstances and conditions as shown by the plaintiff's evidence to infer negligence and say whether upon all the evidence the plaintiff has sustained his allegation."—*Ross v Cotton Mills* 140 NC 115 (119), 52 SE 121.

BURDEN OF PROOF.

697. **What is the general rule for determining upon which of two litigants the burden of proof lies? What is the test of the matter?**

A. The one who asserts the affirmative of the issue. The test is, who would be entitled to judgment if no evidence was produced, the burden being on the one against whom judgment would be rendered if no evidence is introduced.—*I Green Ev Sec 74*.

698. **What is the rule for determining upon which party rests the burden of proof? State the distinction between "the burden of proof" and "the duty of going forward with the evidence."**

A. "The first rule laid down in the books of evidence is to the effect that the issue must be proved by the party who states an affirmative, not by the party who states a negative. Of course such affirmative must be one in substance and not merely in form. An eminent writer on the law of evidence says,

'This rule of convenience . . . has been adopted in practice, not because it is impossible to prove a negative, but because a negative does not admit of the direct and simple proof of which the affirmative is capable; and, moreover, it is but reasonable and just that the party who relies upon the existence of a fact should be called upon to prove his own case.'"—Walker v Carpenter 144 NC 674, 57 SE 461.

The burden of the issue, that is, the burden of ultimately establishing the case of the party on whom the burden rests, never shifts, but the burden of going forward with and producing evidence shifts, dependent upon the state of the evidence, and where a plaintiff proves a fact which raises a prima facie case, or which entitles him to have the issue submitted to the jury, the burden may shift to the defendant, but he is not required to make the evidence preponderate in his favor.—Winslow v Norfolk Hdw Co 147 NC 275, 60 SE 1130.

699. When does the burden of proof become shifted?

A. "Bear in mind that **the burden of proof never shifts.** It remains where it rested when the issue was settled. It is **the duty of going forward with the evidence** which has shifted. When the issue is settled, the case is like a balanced scale, the beam of which is level and the pan at each end empty, the affirming party, the actor, standing at one end, the denying party, the reus, at the other. The actor has the burden of proof and also the duty of going forward. He casts his evidence into the pan at his end till the beam is tipped in his favor. Then he may stop, for the duty of going forward has shifted to the reus, and he must cast evidence into his pan or he will lose, but as soon as the reus has cast in enough evidence to bring the beam to a level, he may stop, and he will win unless more evidence is cast in by the actor, for the burden of proof is on the actor. To win he must have the beam tipped in his favor. The reus will win if he can keep the beam level."—Lockhart's Evidence Sec 221.

700. Upon whom is the burden of proof in a case where the contract of a corporation is alleged to be ultra vires?

A. The contracts of a corporation, not contrary to the express provisions of the charter are presumed to be within its powers, and the burden of proving them otherwise is upon the one alleging ultra vires.—Clark on Corps 163 et seq; Lewis v Steamship Co 131 NC 652; 42 SE 969.

701. What is the effect of evidence tending to show fraud by the original holder of a negotiable paper upon the subse-

quent holder alleging himself to be a bona fide holder for value in due course, in the trial of an action brought by him against the maker?

A. It casts the burden on the holder to show that he acquired the title before maturity, in good faith and for value, and without notice of any infirmity or defect in the title of the person negotiating it.—*Bank v Fountain* 148 NC 590, 62 SE 728.

RELEVANCY, MATERIALITY AND COMPETENCY IN GENERAL.

702. What is meant by *res gestae*?

A. The *res gestae* (things done) are declarations or acts accompanying the acts or transactions in controversy, tending to explain or illustrate them, and which on this account are received in evidence.—*Merrill v Dudley* 139 NC 57, 51 SE 777.

703. If papers or other instruments of evidence have been illegally taken from a person, are they admissible in evidence against him?

A. Yes.—*State v Wallace* 162 NC 622, 78 SE 1.

704. What is the difference between the competency and the materiality of testimony?

A. Competent testimony is such as is admissible under the rules of evidence. Material is such as is essential to make out a case.

705. State the rule as to the admissibility of reputations in questions of boundary.

A. To justify the admission of evidence of common reputation on questions of private boundary, the time at which this reputation had its origin should be a comparatively remote period and always *ante litem* notam, and should attach itself to some monument of boundary or natural object, or be fortified by evidence of acquiescence tending to give the land some fixed and definite location.—*Bland v Beasley* 140 NC 628, 53 SE 443.

Declarations as to private boundaries are admissible when declarant is dead and made before controversy arose, and by disinterested person.—*Lbr Co v Triplett* 151 NC 409, 66 SE 343.

BEST AND SECONDARY EVIDENCE.

706. Give the distinction between primary and secondary evidence.

A. Primary evidence is that kind of evidence which, under every possible circumstance, affords the greatest certainty

of the facts in question. Thus, a written instrument is itself the best possible evidence of its existence and contents. Secondary evidence is that which is inferior to primary. Thus, a copy of an instrument, or oral evidence of its contents, is secondary evidence of the instrument and contents.

In other words, primary evidence means original or first hand evidence; the best evidence that the nature of the case admits of, the evidence which is required in the first instance and must fail before secondary evidence can be admitted. Secondary evidence is that species of evidence which becomes admissible as being the next best, when the primary or best evidence of the fact in question is lost or inaccessible.—Black's Law Dict.

707. **What is secondary evidence?**

A. See Question 706.

ADMISSIONS.

708. **When and under what circumstances is the silence of a party in the presence of a statement made in his hearing a relevant circumstance receivable in evidence?**

A. If he has the privilege to contradict such statement but does not, it may be receivable in evidence. It is received as an implied admission.—Webb v Atchison 124 NC 447, 32 SE 737.

709. **Are the admissions of a co-partner against the other member of a firm admissible, and why?**

A. Admissions of one partner are admissible against the firm when existence of partnership has been established, and when made during the existence of partnership and about the business of the firm.—Tapp v Dibrell 134 NC 546, 47 SE 51.

DECLARATIONS.

710. **Are dying declarations admissible as evidence in the trial of civil actions?**

A. Yes, in actions for the recovery of damages for death by wrongful act.—Con Stat 160.

711. **Explain the phrase "res inter alios acta" as used in the law of evidence.**

A. This is a technical phrase which signifies acts of others or transactions between others. Neither the declarations or any other acts of those who are mere strangers, or, as it is usually termed, *res inter alios acta*, are admissible in evidence against anyone when the party against whom such acts are

offered in evidence was privy to the act, the objection ceases, as it is no longer **res inter alios**.—Bouvier's Law Diet; See *West v Grocery Co* 138 NC 166, 30 SE 565.

This phrase or maxim is the usual abbreviation of the maxim "**res inter alios acta alteri nocere non debet**," or "a transaction between two parties ought not to operate to the disadvantage of a third party," and hence evidence of such transaction is inadmissible.

712. When and under what circumstances are the declarations of an agent receivable in evidence against the principal?

A. It is only after a prima facie case of agency has been established that the acts and declarations of the agent become competent against his alleged principal. When he is shown to be an agent, his acts and declarations in the course of his employment and within the scope of his authority and while he is engaged in the business are competent.—*Brittain v Westall* 137 NC 30, 49 SE 54.

HEARSAY.

713. What is hearsay evidence, and is such evidence, as a general rule, admissible in the trial of an action?

A. It is the kind of evidence which does not derive its value solely from the credit to be given to the witness himself, but rests also upon the veracity or competency of some other person. It is not generally admissible.—*I Green*. Ev Sec 99.

714. In what cases is it admissible?

A. Admissions, confessions, dying declarations, declarations against interest, ancient documents, declarations concerning matters of public interest, matters of pedigree and the **res gestae**.—*King v Bynum* 137 NC 491, 49 SE 955.

PAROL OR EXTRINSIC EVIDENCE AFFECTING WRITINGS.

715. Can a written instrument be explained, added to or contradicted by oral evidence?

A. Not generally.—See Question 716.

716. Can a written contract be altered by an unwritten contract, and if so, explain when it can be done?

A. In the absence of mistake or fraud, when a written contract contains all the essential elements, and its terms are sufficiently comprehensive to embrace the subject matter, parol

evidence will not be admitted to alter the terms of a written contract.—Mfg Co v Mfg Co 161 NC 430, 77 SE 233; Parker v Morrill 98 NC 232, 3 SE 511.

717. When a written instrument contains only a part of a contract can the unwritten part be given in evidence?

A. Yes.—Muking v Newberry 101 NC 17, 7 SE 655.

718. Does the rule that parol evidence is not admissible to vary a writing apply when the action in which the evidence is offered is not between the parties to the contract?

A. The general rule that parol evidence is not admissible to vary the terms of a written instrument does not exclude its admission in an action between the party to the instrument and a stranger, nor between strangers, as a rule applies to actions between the parties thereto or their privies.—Ledford v Emerson 138 NC 502, 51 SE 42; Reynolds v Magness 24 NC 26.

719. Is it competent to prove a parol agreement as to a dividing line? If not, why, and if so, under what circumstances?

A. Not generally, because it would be a conveyance of an interest in lands, and must be in writing. If there had been a legal partition and a controversy arose as to the location of the boundary a parol agreement as to the location of the boundary would be valid. If each tenant had held his portion adversely for twenty years, the line would become legal.—Rhea v Craig 141 NC 602, 54 SE 408.

720. Can an acknowledgement in a deed of the receipt of the purchase money be contradicted by parol?

A. "Where the payment of the consideration is necessary to sustain the validity of the deed or the contract in question the acknowledgement of the payment is contractual in its nature and cannot be contradicted by parol proof; but where it is to be treated merely as a receipt for money it is only *prima facie* evidence of the payment, and the fact that there was no payment, or that the consideration was other than that expressed in the deed, may be shown by oral evidence."—Deaver v Deaver 137 NC 241, 49 SE 113.

721. What is the distinction between a patent and latent ambiguity? Can they be explained by parol evidence?

A. A patent ambiguity appears on the face of the instrument itself. Latent ambiguity arises out of the circumstances attending the instrument. Latent ambiguity can be explained by parol evidence, but patent cannot.—Institute v Norwood 45 NC 65.

722. State the rules of evidence in cases of latent and patent ambiguity, and state the reason for the rule.

A. "The rule as to patent ambiguity is that it is a question of construction. Hence the instrument must speak for itself, and in case of doubt, no evidence outside can be called in aid; for the only purpose of construction is to find out what the instrument means, and that must depend upon what the instrument says.

"The rule as to latent ambiguity is that it is a question of identity—a fitting of the description to the person or thing, which can only be done by evidence outside, or **dehors**, the instrument; for how can any instrument identify a person or thing? It can describe, but the identification, the fitting of the description, can only be done by evidence **dehors**."

If there be a patent ambiguity in an instrument the instrument must speak for itself, and evidence **dehors** cannot be resorted to.

In cases of latent ambiguity evidence **dehors** is not only competent, but necessary.—*Institute v Norwood*, supra.

OPINION EVIDENCE.

723. Why are the opinions of witnesses not in general received in evidence?

A. Because the jury are sole judges of the facts and the witnesses can only state facts and leave the jury to draw conclusions.

724. Under our decisions, what is the rule in regard to opinion evidence in proving testamentary capacity, and upon whom is the burden of proof?

A. Any person who knew estator may give his opinion as to testamentary capacity, but such opinion must be based upon personal association or observation of the witness, and proceed from facts or observations detailed from others.—*Myatt v Myatt* 149 NC 137 (140), 62 SE 887.

WEIGHT AND SUFFICIENCY.

725. What are the rules with regard to the question or intensity of proof in civil and criminal actions?

A. The burden of proof is always upon the state to satisfy the jury beyond a reasonable doubt in order to convict of a criminal offense.—*State v Little* 178 NC 722; *State v Matthews* 66 NC 106.

But the defendant in a criminal action is not held to the above rule. He need only prove his defense to the satisfaction of the jury.—*State v Pain* 86 NC 609.

In this state the degree or intensity of proof required in civil actions has been divided into two classifications only:

1. Those facts which must be established by a preponderance of the evidence, or to the satisfaction of the jury. This is the general rule in civil actions.

2. Those facts which must be established to the satisfaction of the jury by clear, cogent and convincing proof. This rule applies in actions to convert an absolute deed into a mortgage, to attach a parol trust to a legal estate, etc.—*Perry v Ins Co* 137 NC 402 (404); *Lockhart's Ev* See 264.

726. What is the difference between preponderance of evidence and proof beyond a reasonable doubt, and in what class of cases is the first sufficient and the other necessary?

A. Preponderance of evidence means that the weight of evidence is more on one side than it is on the other. Proof beyond a reasonable doubt means that a reasonable mind could reach no other conclusion. The former applies to civil actions, and the latter to the state in criminal matters.—*Lockhart's Ev* See 278.

727. What kind of proof is required to correct a mistake in a deed or other written instrument?

A. The proof must be clear, strong and convincing.—*Lehew v Hewitt* 138 NC 6, 50 SE 459; *King v Hobbs* 139 NC 170, 51 SE 911.

728. What is the rule of law as to the quantum of evidence necessary to set aside a sheriff's return setting forth service of summons or other legal process?

A. The evidence must be clear and unequivocal, the testimony of more than one person being required.—*Comrs v Spencer* 174 NC 36, 93 SE 435.

729. Upon a demurrer to the evidence, in what respect must the judge review the evidence?

A. In the light most favorable to the plaintiff.—*Sykes v Ins Co* 148 NC 13, 57 SE 391.

730. When a motion for arrest of judgment as of nonsuit is made by the defendant at the close of the evidence, how must the evidence be considered by the Court?

A. In the light most favorable to the plaintiff.—*Morton v Lbr Co* 152 NC 54, 67 SE 67.

EXECUTION

731. On judgment recovered for a money demand, what is the usual method of enforcing it, and what kinds of property can be subjected to the process?

A. Execution.

“The property of the judgment debtor not exempted from sale under the constitution and laws of this state may be levied on and sold under execution as hereinafter prescribed:

“1. Goods, chattels and real property belonging to him.

“2. All leasehold estates of three years duration or more owned by him.

“3. Equitable and legal rights of redemption in personal and real property pledged or mortgaged by him. But when the equity of redemption in personal property is sold under execution, notice of the time and place of said sale shall be given the mortgagee.

“4. Real property or goods and chattels of which any person is seized or possessed in trust for him.

“But no execution shall be levied on growing crops until they are matured.”—Con Stat 677.

732. When may an execution issue against the person?

A. Execution may issue against the person in an action in which the defendant might have been arrested—Con Stat 673.

733. A obtains a judgment against B who has no property except solvent credits. How may the judgment be collected?

A. By supplementary proceedings in execution.—Con Stat 719.

734. What remedy is provided to discover a judgment debtor's property?

A. Supplementary proceedings in execution.—Con Stat 711-727.

735. What are supplementary proceedings, and what purpose do they serve?

A. This is a provision of the code of civil procedure to reach the property of an execution debtor which was not subject to levy under execution.—Con Stat 711-727.

736. In cases of notes, accounts, etc., due to the debtor, what is the method provided by law for their application to judgments?

A. Supplemental proceedings in execution.—Con Stat 711-727.

EXECUTORS AND ADMINISTRATORS

ADMINISTRATION IN GENERAL, 737.

APPOINTMENT, QUALIFICATION AND TENURE, 739.

COLLECTION AND MANAGEMENT OF ESTATE, 744.

ALLOWANCE AND PAYMENT OF CLAIMS, 752.

SALES AND CONVEYANCES UNDER ORDER OF COURT, 753.

FOREIGN AND ANCILLARY ADMINISTRATION, 754.

LIABILITY ON ADMINISTRATION BONDS, 756.

EXECUTORS DE SON TORT, 757.

ADMINISTRATION IN GENERAL.

737. What is the difference between an executor and an administrator?

A. An executor is named in the will. The administrator is appointed by the court.—II Black 503, 504.

738. What is an administrator cum testamento annexo? Who appoints and what are his powers?

A. Administrator with the will annexed. In cases where testator appoints no executor, or for some reason the one appointed cannot or will not act as executor, the clerk of the court appoints an administrator with the will annexed who has the same powers of any administrator, but is guided by the provisions of the will.—Con Stat 22, 23.

APPOINTMENT, QUALIFICATION AND TENURE.

739. In cases of intestacy, to whom are letters of administration granted?

A. The statute provides that letters of administration shall be granted in cases of intestacy to the persons entitled thereto in the following order:

1. To the husband or widow, except as hereinafter provided.

2. To the next of kin in the order of their degree, where they are of different degrees; if of equal degree, to one or more of them, in the discretion of the clerk.

3. To the most competent creditor who resides within the state, and proves his debt on oath before the clerk.

4. To any other person legally competent.—Con Stat 6.

740. In what court must letters of administration be taken out?

A. In the Superior Court.

741. Is an executor required to give bond in this state?

A. An executor is required to give bond in the following cases:

1. Where the executor resides out of the state.
2. Where a man marries an executrix, husband of executrix is required to give bond.
3. Where the executor has obtained an order to sell real estate.—Con Stat 34.

742. When does a person become the executor of an executor, and why?

A. When the executor dies leaving an executor the interest vested in the executor of a will may be continued and kept alive by the will of the same executor, so that the executor of A's executor is to all intents and purposes the executor of A himself, but the executor of A's administrator or the administrator of A's executor is not the representative of A.—II Black 506.

743. When is an administrator de bonis non appointed?

A. When the administrator has for some reason failed to administer upon the entire estate.—Schuler's Executors 514.

COLLECTION AND MANAGEMENT OF ESTATE.

744. What is the order of payment of debts of the decedent?

A. "FIRST CLASS: Debts which by law have a specific lien on property to an amount not exceeding the value of such property.

"SECOND CLASS: Funeral expenses.

"THIRD CLASS: Taxes assessed on the estate of the deceased previous to his death.

"FOURTH CLASS: Dues to the United States and to the State of North Carolina.

"FIFTH CLASS: Judgments of any court of competent jurisdiction within this state docketed and in force to the extent to which they are a lien on the property of the deceased at his death.

"SIXTH CLASS: Wages due to any domestic servant or mechanical or agricultural laborer employed by the deceased, which claim for wages shall not extend to a period of more than one year next preceding the death, or if such servant or laborer was employed for the year current at the decease, then from the time of such employment; for medical services within twelve months preceding the decease.

"SEVENTH CLASS: All other debts and demands."—Con Stat 93.

745. What is the standard by which the responsibility of an executor or administrator in the management of the estate is measured?

A. "He is required to use such ordinary diligence, care, foresight and circumspection as an ordinary sensible and prudent man would do under the like conditions and circumstances as to his own property and affairs.—*Tayloe v Tayloe* 108 NC 69, 12 SE 836.

746. If an executor should find that a chattel, such as a diamond ring, had been specifically bequeathed and was in a pawn broker's shop, what would be his duty in the premises?

A. If the ring would sell for more than the amount for which it was pledged, it would be his duty to redeem it for the legatee.—See *Grant v Williams* 28 NC 341.

747. When a testator has imperatively directed his property to be sold and turned into money, what rule will control as to the subsequent devolution of the money, and why?

A. Equitable conversion, for equity considers that as done which ought to be done so that the land is treated as money.—*Bispham's Equity* Sec 307; See Question 321 et seq.

748. If the personal representative collects the rents and profits of real estate, to whom must he account therefor, to the heirs, or in his official capacity to the probate court?

A. To the probate court.—*Jennings v Copeland* 90 NC 572.

749. Would gravestones and monuments be items of cost to a reasonable extent in the settlement of the estate?

A. Yes, when cost does not exceed \$100.—Con Stat 108.

750. Suppose an executor or administrator should make a contract for the benefit of the estate, would he be personally bound?

A. Yes.—*Kerchner v McRae* 80 NC 219.

751. As regards personal assets, may one of the co-executors do whatever all could have done, or must they act jointly?

A. One may act for all.—Schuler's executors 497.

ALLOWANCE AND PAYMENT OF CLAIMS.

752. A testator devises a particular tract of land to A, which land is subject to a mortgage made by the testator in his life time, no mention being made in the will of the mortgage. The will provides that the just debts of the testator shall be paid. Does A take the land subject to the mortgage, or must the executor pay the mortgage, and let A take it free from encumbrance?

A. Executor must pay mortgage out of personalty of decedent.—40 Cyc 2063.

SALES AND CONVEYANCES UNDER ORDER OF COURT.

753. In case it shall become necessary for the personal representative to sell the lands of the deceased to make assets for the payment of debts, is he authorized to sell such real estate as the decedent may have conveyed with intent to defraud his creditors?

A. Yes.—Webb v Atkinson 124 NC 447, 32 SE 737.

FOREIGN AND ANCILLARY ADMINISTRATION.

754. What is ancillary administration? How are estates divided in cases of such administration?

A. It is administration in a state other than the domicile of deceased. Assets in such cases are applied to debts due in such state, and any balance paid to the original testator.—Schuler's Executors 233 et seq.

755. When and where is it taken out?

A. When decedent lived in one state leaving property in another, ancillary administration is taken out for the administration of the property in such other state. The time and manner of taking out such administration is governed by the law of the state in which it is taken out.—Schuler's Executors 235.

LIABILITY ON ADMINISTRATION BONDS.

756. An executor or administrator files his final account showing a balance due. When is an action by the party enti-

tled to recover such balance barred by the statute of limitations when brought against the sureties of the bond? When barred as against the executor or administrator personally?

A. Barred as to sureties three years after demand for settlement.—Con Stat 441 subsec 6; *Settle v Settle* 141 NC 553 (574), 54 SE 445.

Barred as to executor or administrator personally in six years after auditing of final account.—Con Stat 439.

EXECUTORS DE SON TORT.

757. What is meant by an executor de son tort, and what generally is his liability?

A. He is one who, without authority, presumes to act for the intestate. He is liable for all assets that come into his hands, but is allowed no compensation.—Con Stat 4.

758. When may a person be charged as an executor de son tort?

A. A person makes himself chargeable as executor de son tort by acts of such a character as indicate that he is possessed of authority to administer upon the estate.—18 Cyc 1355.

EXTRADITION

759. What provision is made with reference to the extradition of offenders against state laws?

A. "A person charged in any state with treason, felony, or other crime, who shall flee from justice and be found in another state, shall on demand of the executive authority of the state from which he has fled, be delivered up to be removed to the state having jurisdiction of the crime."—US Const Art IV, Sec 2, cl 2.

760. What constitutes fleeing from justice?

A. To leave one's home, residence, or known place of abode, or to conceal one's self, with intent, in either case, to avoid detection or punishment for some public offense.—Black's Law Dict.

761. Is there any remedy for an improper refusal to comply with the demand for a requisition?

A. I know of no remedy.

FALSE PRETENSE

762. Define false pretense.

A. The false representation of a subsisting fact calculated to deceive, and which does deceive, and is intended to deceive, whether the representation be in writing, or in words or in acts, by which one man obtains value from another without compensation.—State v Plifer 65 NC 321.

763. If a man shall order of another a ton of coal and if the other sends in a bill for a ton, knowing it to be less, of what offense is he guilty, if any?

A. False pretense.—State v Ice Co 166 NC 403, 81 SE 956.

FEDERAL EMPLOYERS' LIABILITY ACT

764. Under what clause of the Federal Constitution has Congress assumed to pass the Federal Employers' Liability Act?

A. See Question 164.

765. Explain the doctrine of contributory negligence as administered under the Federal Employers' Liability Act.

A. "The Federal Employers' liability does not, as we understand it, change the rule of law as to what is contributory negligence, except as to its legal effect upon the issue as to damages, an affirmative finding in respect to such (contributory) negligence reducing the amount of damages as indicated in the act."—Rains v RR 169 NC 189 (193).

Note: As the writer understands it, the Federal Employers' Liability Act follows the established rule as to what constitutes contributory negligence, but discards its application as to measure of damages, the damages being diminished in proportion to the plaintiff's contributory negligence.

766. To what companies or persons does the Federal Employers' Liability Act apply, and in what courts can actions under such statute be instituted?

A. It applies to those engaged in interstate commerce. Actions may be brought in either the state or Federal courts.—Burnett v RR 163 NC 186, 79 SE 414.

767. In what cases will the Federal Employers' Liability Act apply to an action against an intrastate corporation?

A. The Federal Employers' Liability Act applies only to interstate corporations.—Pederson v RR 229 US 146; Mandau v RR 223 US 9.

768. What is the difference in the measure of damages for wrongful death under the state law and under the Federal Employers' Liability Act?

A. Under the North Carolina law contributory negligence is a bar to recovery for damages for wrongful death. Under the Federal Employers' Liability Act, contributory negligence is not a bar to recovery, but damages shall be diminished by the jury in proportion to the negligence of such employee.—*Coley v RR* 129 NC 407, 40 SE 195; *Mandau v RR* 223 US 9.

769. In North Carolina are railroad companies responsible or not to a servant for injuries caused by the negligence of a fellow servant?

A. They are, under the Federal Employers' Liability Act and under the North Carolina statute.—*Con Stat* 3465; *Coley v RR* 129 NC 407, 40 SE 195.

770. How is the doctrine as to contributory negligence and assumption of risk affected by the Federal Employers' Liability Act, and to what extent did the two defenses survive the passage of the law?

A. Under the Federal Employers' Liability Act contributory negligence is not a complete defense, but material only in reduction of damages.—*Kenney v RR* 165 NC 99, 80 SE 1078.

FIXTURES

771. What is a fixture, and when are fixtures removable?

A. Fixtures are articles of personal property attached to the realty. They are removable when it was the intention of the parties at the time that they should be removed, the right to move depending upon, in large measure, the intention of the parties and the relation of the parties, as in mortgagor and mortgagee, vendor and vendee, life tenant and remainderman, landlord and tenant. In case of a mortgage, as a general rule, practically nothing is removable, while in case of tenant, most all things are removable.—*Overman v Sasser* 107 NC 432, 12 SE 64.

FRAUD

772. Define fraud as it is applied in courts of equity.

A. Fraud in the sense of a court of equity properly includes all acts, omissions and concealments which involve a breach of legal or equitable duty, trust or confidence justly imposed, and are injurious to another or by which an undue or unconscientious advantage is taken of another.—*Black's Law Dict.*

773. What four requisites are necessary to make a representation fraudulent?

A. 1. The statement must be untrue in fact.

2. The person making the statement or the person responsible for it, either knows it to be untrue or is culpably ignorant (that is, recklessly and consciously ignorant) whether it be true or false.

3. Must be made with the intent that the plaintiff shall act upon it, or in a manner apparently fitted to induce him to act upon it.

4. The plaintiff must act in reliance on the statement in a manner contemplated or manifestly probable and thereby suffers damage.—*Unitype Co v Ashcraft* 155 NC 63 (66), 71 SE 61.

774. Into what four classes has Lord Hardwick divided fraud as laid down by Bispham and other writers?

A. 1. Fraud arising from the facts and circumstances of the imposition.

2. Fraud arising from the intrinsic matter of the bargain itself.

3. Fraud presumed from the circumstances and conditions of the parties contracting.

4. Fraud affecting third persons not parties to the agreement.—*Bispham's Equity* Sec 205.

775. What is the difference between fraud in the factum and fraud in the procurement of a deed? Give illustration.

A. Fraud in the factum renders a deed absolutely void and no rights can be asserted under it in favor of any person whomsoever. A deed made by reason of fraud in the treaty is voidable, and an innocent purchaser without notice would obtain a good title. In *McArthur v Johuson*, 61 NC 317, the courts give an instance of fraud in the factum where the grantor intended to execute a certain deed and another deed is surreptitiously substituted in the place of it. But where a party proposed to convey a tract of land in trust, and his brother in drawing the deed inserted the conveyance of another tract in trust for himself, and the vendor refused to read the deed or hear it read, it was held there was not fraud in the factum, but fraud in the procurement. Fraud in the factum could have been relieved in law, but fraud in the procurement demands an equitable remedy.—*Medlin v Buford*, 115 NC 260, 20 SE 463.

776. Are transactions tainted with fraud void or only voidable?

A. Fraud in the factum makes the contract void. Fraud in the treaty makes the contract voidable at the option of either party.—*Medlin v Buford*, *supra*.

777. What is the difference between deceit and false warranty?

A. Deceit is an action in tort brought for a fraud, while false warranty is a form of fraud or deceit upon which an action may be brought either in contract or in tort.—*Cooley on Torts* 90.

778. Are there any cases of fraud against which equity will afford no relief?

A. Equity never affords relief where there is an adequate remedy at law, and the law writers often state that with the single exception of fraud in obtaining a will the courts of equity will give relief, but this single exception is based on the fact that the courts of law (probate courts, etc.) give a full and adequate remedy.—See *Broderick's Will*, 21 Wall (US) 503, 22 L Ed 599; 16 Cyc 81, note 93.

779. Why is the jurisdiction of chancery courts superior to that of common law courts in its relation to fraud?

A. Because in equity fraud has a more extensive significance than at law, and because the relief afforded is much more complete.—*Bispham's Equity* See 24.

780. Give some instances of constructive fraud against which equity will afford relief.

A. Transactions between attorney and client, guardian and ward, and other fiduciary relations.—*Bispham's Equity* Secs 230, 240.

781. If an infant or feme covert aid or abet a fraud, will the court exonerate them by reason of their disability?

A. No.—*Bell v McJones* 151 NC 85, 65 SE 646; *Adams' Equity* 175.

782. If a husband makes a deed or gift of personal property at the common law directly to his wife, how is it supported and how does it affect creditors?

A. At the common law, owing to the merger of identity of husband and wife, the husband could not by deed convey directly to his wife any title in lands. He might convey to a third party as a medium, and then vest the legal estate in the

wife, but in spite of the common law rule, equity might uphold a direct conveyance from the husband to the wife, providing it did not affect the rights of third parties.—See *Worlick v White* 86 NC 139.

783. If the private examination of a married woman as to the execution of a deed is procured by fraud, is the deed valid as to the married woman? If so, under what circumstances?

A. It is not if grantee knew of the fraud or is shown to have had notice of the fraud before delivery of the instrument and has not already conveyed to an innocent purchaser for value.—Con Stat 1001; *Butner v Blevins* 125 NC 585, 34 SE 629.

784. Would a contract in which the inadequacy of the consideration was gross, as where, for instance, a contract was made to pay a hundred dollars for a bushel of ordinary wheat, be enforced in equity, and if not, on what grounds?

A. No, on the ground that it was an unconscionable contract from which fraud must be inferred, and according to the classification of Lord Hardwick, it falls under the heading of “fraud arising from the intrinsic matter of the bargain.”—See Question 774.

785. A buys a horse from B for \$200, relying upon the representation that the horse is sound, where in fact the horse is not worth more than \$50. What are the remedies of A? If he sues to recover damages, what is the rule for assessing?

A. “Where a sale has been effected by an actionable fraud, the purchaser has an election of remedies. He may ordinarily, at least at the outset, rescind the trade, in which case he can recover the purchase price, or any portion of it he may have paid; or avail himself of the facts as a defense in bar of the recovery of the purchase price or any part of it which remains unpaid, or he may hold the other party to the contract and sue him to recover the damages he has sustained in consequence of the fraud.

“In order to rescind, however, the party injured must act promptly and within a reasonable time after the discovery of the fraud, or after he should have discovered it by due diligence; and he is not allowed to rescind in part and affirm in part; he must do one or the other. And, as a general rule, a party is not allowed to rescind where he is not in a position to put the other in *statu quo* by restoring the consideration passed. Furthermore, if, after discovering the fraud, the in-

jured party voluntarily does some act in recognition of the contract, his power to rescind is then at an end."—*May v Loomis* 140 NC 350, 52 SE 728.

In an action for fraud and deceit in the transfer of personal property, the measure of damages is the difference between the value of the article at the time of the sale, if sound, and its value if unsound at the time of the sale, and it can make no difference what disposition the purchaser has made of it afterwards.—*Lunn v Sherner* 93 NC 164.

786. A induces B to purchase personal property by false and fraudulent representations. What are the remedies of B?

A. May rescind contract and sue for damages or may abide by contract and sue for damages.—*May v Loomis*, supra.

FRAUDS, STATUTE OF

PROMISES TO ANSWER FOR DEBT OF ANOTHER, 795.

REAL PROPERTY AND INTERESTS THEREIN, 796.

SALES OF GOODS, 803.

787. Why is it that some contracts bind the parties thereto without being in writing, and some do not bind unless they are in writing?

A. Because certain contracts are required by statute to be in writing.

788. What is the statute of 29 Car. II, Chapter 3, usually known as, and what is the substance of its fourth and seventeenth sections?

A. The Statute of Frauds:

Fourth Section: "No action shall be brought,

"(1) Whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate;

"(2) Or whereby to charge the defendant upon any special promise to answer for the debt, default or misearriage of another person;

"(3) Or to charge any person upon an agreement made upon consideration of marriage;

"(4) Or upon any contract for the sale of any land, tenements, hereditaments, or interest in or concerning them;

"(5) Or upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall be brought or

some memorandum or note thereof shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

Seventeenth Section: "That no contract for the sale of any goods, wares or merchandise, for the price of ten pounds sterling or upwards shall be allowed to be good, except the buyer shall accept a part of the goods so sold and actually receive the same, or give something in earnest to bind the bargain or in part payment, or that some note or memorandum in writing of said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized."—Clark on Contracts 97.

789. When was the statute of frauds enacted in England?

A. 29 Car. II, Chapter 3 (1677).—8 A & E Ency Law 657.

790. What was the purpose of the statute Thirteen Elizabeth Chapter 5, and Twenty-seven Elizabeth Chapter 4, and have these statutes been enacted into the Code?

A. The object was to prevent conveyance to hinder, delay or defraud creditors, or to defraud purchasers.—Bispham's Equity Sec 241-250.

Enacted into the Code.—Con Stat 1005, 1006.

791. What contracts must be in writing to bind the parties?

A. 1. Promises of executors and administrators to pay debts of deceased out of own funds.—Con Stat 987.

2. Promises to answer for the debt, default or miscarriage of another.—Con Stat 987.

3. Contracts for the sale of land or any interest therein for more than a lease for a term of three years.—Con Stat 988.

4. Contracts with Cherokee Indians for more than ten dollars.—Con State 989.

5. Promises to pay debts barred by the statute of limitations.—Con Stat 416.

6. Promises to pay debts discharged in bankruptcy.—Con Stat 990.

7. Certain contracts between husband and wife.—Con Stat 2515.

8. Leases of land for the purpose of mining.—Con Stat 988.

792. Give the requirements of our statute of frauds with reference to executory contracts to sell land.

A. "All contracts to sell or convey any lands, tenements or hereditaments, or any interest in or concerning them, and

all leases and contracts for leasing land for the purpose of digging for gold or other minerals, or for mining generally, of whatever duration: and all other leases and contracts for leasing lands exceeding in duration three years from the making thereof, shall be void unless said contract, or some memorandum or note thereof be put in writing and signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized."—Con Stat 988.

793. In such contracts purporting to bind the vendor, is it required that the consideration be expressed, and how is this in reference to the vendee?

A. Not required as to vendor, but is required as to vendee.—Hall v Misenheimer 137 NC 183, 49 SE 104.

794.

"Raleigh, N. C., Feb. 1, 1919.

"Received of John Doe One Hundred Dollars on sale of my home place.

(Signed by vendor)

"RICHARD ROE."

The full consideration being One Thousand Dollars, is this a sufficient memorandum under the statute?

A. It is as to vendor, but not as to vendee.—Hall v Misenheimer, supra.

PROMISES TO ANSWER FOR DEBT OF ANOTHER.

795. Is an action maintainable upon a promise made by the defendant to a third person for a valid consideration to such defendant for the benefit of the plaintiff, the latter not being privy to the consideration?

A. Yes.—Gorrell v Water Co 124 NC 328, 32 SE 720; Morton v Water Co 168 NC 582, 84 SE 1019.

REAL PROPERTY AND INTERESTS THEREIN.

796. What statute in England required conveyances of land to be in writing, and why was it enacted?

A. The statute of frauds. It was enacted to prevent frauds and perjuries.—II Black 337.

797. What is the statute of North Carolina as to deeds and contracts concerning land?

A. They must be in writing, except leases to continue for a term of three years or less. All leases for mining purposes must be in writing.—Con Stat 988.

798. Under the statute of frauds, section four, what is the difference between the effect of a contract for the sale of crops produced from the earth by labor, and a contract for the sale of crops that are the natural produce of the earth?

A. The first, or *fructus industriales*, were regarded as personal property, and would not come under the fourth section of the statute as "lands or interests therein," but the latter, or *fructus naturales*, were regarded as real property and would. —Clark on Contracts 75.

799. What were the provisions of the statute of frauds in regard to devises of land, and what were the reasons for them?

A. Any writing, bare notes, etc., were held to be sufficient under the statute of wills; this led to innumerable frauds and perjuries, to prevent which the statute of frauds provided: "That all devises of lands and tenements shall not only be in writing, but signed by the testator or some other person in his presence, and by his express direction; and be subscribed in his presence by three or four creditable witnesses."—II Black 376.

800. Under section four of the statute of frauds, could an agent not appointed in writing make a valid contract for his principal for the sale of land?

A. Yes.—Smith v Brown 132 NC 365, 43 SE 915.

801. Give the requirements of our statute of frauds with reference to executory contracts to sell land.

A. "All contracts to sell or convey any lands, tenements or hereditaments or any interest in or concerning them, and all leases and contracts for leasing land for the purpose of digging for gold or other minerals, or for mining generally, of whatever duration; and all other leases and contracts for leasing lands, exceeding in duration three years from the making thereof, shall be void unless said contract, or some memorandum or note thereof be put in writing and signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized."—Con Stat 988.

802. A agrees by parol to sell B a store, lot and stock of goods for \$1,000, but refuses to convey the lot. Can he be compelled to do so. Can B be compelled to pay for the goods if the lot is not conveyed? Give reason.

A. No. Parol contract for the sale of land is not enforceable. B cannot be compelled to pay for the goods alone, as he did not contract for the goods alone, but for the lot and the

goods, and he may refuse to take a part of the contract if he cannot get the other part, the contract being indivisible, cannot be enforced in part only.—Clark on Contracts 27; Con Stat 988.

SALES OF GOODS.

803. What is the general rule by which to determine whether a promise to pay for articles sold to another is within the statute of frauds?

A. To bring it within the statute of frauds there must be a third party who is primarily liable while the promisor is collaterally liable.

804. Give an illustration of such a promise to which the statute applies and also one to which it does not apply.

A. A says to B, "Let us have the goods and I will pay for them." This need not be in writing, but when A says to B, "Let C have the goods and if he does not pay for them I will," this is within the statute of frauds and must be in writing.—Clark on Contracts 66; *Peele v Powell* 156 NC 553, 73 SE 234.

FRAUDULENT CONVEYANCES

805. When is a conveyance void as to creditors?

A. When the conveyance was made upon an inadequate consideration with the view of defrauding creditors of their just rights to judgment and under execution against the property conveyed.—*Shernor v Spear* 92 NC 148; Con Stat 1006.

806. A bought some land for which he paid out of his own money. He procured the deed to be made to his wife without her knowledge. Who is the owner of the land?

A. Conveyance to wife is good if husband retains sufficient property to pay all his debts. If he does not retain sufficient property, deed may be set aside and the property subjected to the payment of the husband's debts.—*Taylor v Eaton* 92 NC 601; Con Stat 1005.

807. A makes a conveyance of his land to B which is fraudulent and void as against the creditors of A; a creditor takes judgment and issues execution, treating the conveyance as void. Can the homestead of A be sold?

A. No.—*Rose v Bryan* 157 NC 173, 72 SE 960.

808. Is there any instance in which a consideration in a deed is necessary to support a conveyance?

A. Yes, where the conveyance would otherwise be a fraud upon creditors.—*Howard v Turner* 125 NC 107, 34 SE 229.

809. **What is the legal effect under our statute, of the sale by a debtor of his stock of goods in bulk with respects to the rights of his creditors? Explain in full.**

A. The sale in bulk of a large part, or the whole of a stock of merchandise, otherwise than in the ordinary course of trade, etc., shall be prima facie evidence of fraud. Such sale, without complying with the statute is absolutely void as to creditors not receiving the notice required.—Pennell v Robinson 164 NC 257, 80 SE 417.

810. **State in substance the important provisions of the statute regulating sale of merchandise in bulk.**

A. The sale in bulk of a large part or a whole of a stock of merchandise shall be prima facie evidence of fraud, and void as against creditors of seller, unless the seller, at least seven days before such sale, makes an inventory showing quantity and cost price of the goods to be sold and notifies his creditors of such sale, stating the terms and conditions thereof. This shall not be necessary if the seller execute a bond in an amount equal to the actual cash value of said stock of goods, conditioned that the seller will apply the proceeds of the sale to the discharge of his debts, subject to the seller's exemption as allowed by law.—Con Stat 1013.

811. **A, a merchant, being in debt and insolvent, sells his stock of goods in bulk to B without notice to his creditors. What are the rights of A's creditors?**

A. The sale is presumed to be fraudulent, and may be set aside by creditors unless debtor makes inventory and gives bond to trustee to pay to creditors proceeds of sale, over and above exemptions.—Con Stat 1013.

GAMING

812. **A and B play at a game of cards at which money is bet, in the private residence of A. Are A and B guilty of a violation of the law? If so, what?**

A. Yes, playing at any game of chance at which money is bet is a misdemeanor.—Con Stat 4430 ; State v Black 94 NC 809.

GIFTS

813. **What is a donatio causa mortis?**

A. They are gifts made in view of approaching death.—Newman v Bost 122 NC 524, 29 SE 848.

814. **To what species of property do they belong?**

A. They belong to personal property only.—Ibid.

815. **State the necessary attributes to a donatio causa mortis.**

A. There must be an actual or constructive delivery with the present intent to pass the title.—Askew v Matthews 175 NC 187, 95 SE 163.

816. **What are the three essentials to the validity of a gift causa mortis?**

A. It must have been made in the last sickness of the donor, must have been delivered, and must be proved by at least one witness.—Newman v Bost 122 NC 524, 29 SE 848.

GRAND JURY

817. **What is the greatest and least number of which a grand jury can consist, and how many must concur in finding a true bill?**

A. Eighteen is the greatest and twelve is the least number of which a grand jury can consist. Twelve may find a true bill.—Con Stat 2333; State v Perry 122 NC 1018, 29 SE 384.

818. **How many grand jurors must concur in finding a true bill? Must the grand jury be unanimous?**

A. Twelve grand jurors must concur in finding a true bill. There must always be at least twelve present, and at least twelve concur in finding the bill, regardless of how many grand jurors are present.—State v Perry 122 NC 1018, 29 SE 384.

819. **Is the trial of a party in a recorder's court, without indictment by a grand jury, for a crime less than felony, valid or invalid?**

A. It is valid.—State v Collins 151 NC 648, 65 SE 617.

GUARANTY

820. **What is a guaranty, and what are the different kinds?**

A. A guaranty is a promise to answer for the payment of some debt, or the performance of some duty, in case of the failure of another person who is himself in the first instance liable to such payment or performance.—Cowan v Roberts 134 NC 415, 46 SE 979.

CLASSIFICATION:

1. Guaranty of payment.

2. Guaranty of collection.—Jenkins v Wilkinson 107 NC 707, 12 SE 630.

821. When will the consideration of the original contract support a guaranty made subsequently thereto?

A. In cases in which creditor agrees to give debtor time.—*Supply Co v Person* 154 NC 456, 70 SE 745.

The agreement to extend time is, in fact, a consideration for the guaranty.

HABEAS CORPUS

822. Define the writ of habeas corpus. By what guarantee is it secured to the people of North Carolina?

A. It is a writ issued from the Supreme, or a Superior Court, by the judge thereof, directed to a person detaining another, and commanding him to produce the body of him detained at a certain time and place, that the legality of the imprisonment may be determined.

This definition is not intended to be universal, as other states may have other provisions as to by whom the writ is issued.

The Constitution of the United States, Article I, Section 9, provides that "The privilege of the writ of habeas corpus shall not be suspended unless when in case of rebellion or invasion the public safety may require it." The Constitution of North Carolina provides that "The privileges of the writ of habeas corpus shall not be suspended."—*In re Bryan* 60 NC 1; NC Const Art I Sec 21.

823. In what reign and year was the habeas corpus act passed?

A. 31 Car II (1679).

824. By what writ is the personal liberty of a citizen guaranteed?

A. The right of personal liberty was first secured to the people of England by the habeas corpus act, passed under Chas. II in 1679, similar statutes have been enacted in almost all of the states of the American Union.—I Black 128; See also Question 822.

825. In what cases will the writ of habeas corpus be refused an applicant? Who may apply for it? Who can issue it, who can serve it, and what is the procedure?

A. It will be refused:

1. When persons are imprisoned by process in United States Courts in cases in which such courts have exclusive jurisdiction.

2. When imprisoned under a full judgment of a court of competent jurisdiction.

3. When person neglects to apply for writ for space of two whole terms of superior court of county in which he is imprisoned, such person shall not have a habeas corpus in vacation time.

4. When no probable ground is shown for relief of applicant.

Any person imprisoned or any person in his behalf, may apply for it. Any justice of the Supreme Court or any judge of the Superior Court, may issue it. It may be served by any qualified elector thereto authorized by the judge or justice issuing the same. Notice is given solicitor, and when the judge thinks proper, the prisoner and witnesses are brought before the court and the testimony taken, and such order made as to the court seems proper.—Con Stat 45.

HOMESTEAD

826. **How much is the homestead, and how much is the personal property exemption?**

A. Homestead is land to the value of \$1,000. Personal property is exempt to the value of \$500.—NC Const Art X Secs 1, 2; Con Stat 728.

827. **In what modes may they be laid off?**

A. By the sheriff under execution, appraisers being summoned for the purpose, and on petition.—Con Stat 730, 745.

828. **Who may except to the allotment? How and when may the exception be tried?**

A. The debtor or the creditor. Exceptions should be levied at the next term of the Superior Court, having priority over all other causes.—Con Stat 740.

829. **Under our statute, if the allotted homestead is conveyed, does it become at once liable for sale under docketed judgment prior to the conveyance? And is one who has conveyed away his homestead entitled to have another allotted?**

A. Yes. It may be sold, and he may have another one allotted since 1905.—Con Stat 729.

830. **If an officer under an execution duly docketed make sale of defendant's land without having the homestead laid off, is such sale valid, and will the officer's deed pass any title?**

A. Deed passes no title.—McCracken v Adler 98 NC 400; 4 SE 138.

831. **How is this as to personal property exemptions?**

A. Personal property exemption need not be allotted unless demanded.—Con Stat 737.

832. **What is the provision of the state constitution in reference to a conveyance by an owner of a homestead and does the limitation therein referred to apply before allotment?**

A. The owner of a homestead may dispose of the same by deed; but no deed made by the owner of a homestead shall be valid without the voluntary signature and assent of his wife, signified by her private examination according to law. The provision applies before allotment.—Art X Sec 8; See *Joyner v Sugg* 132 NC 580, 44 SE 122; *Ball v Paquin* 140 NC 83 (97), 52 SE 410; *Cawfield v Owens* 129 NC 286, 40 SE 62.

833. **After the homestead has been allotted against a docketed judgment, is the exemption thereof from the execution valid against the grantee of the homesteader during the homesteader's lifetime?**

A. Homestead is not exempt after it has been conveyed.—Con Stat 729.

834. **May the appraisers include in the homestead allotment tracts of land not contiguous?**

A. Different tracts or parcels of land not contiguous may be included in the same homestead when a homestead of contiguous land to the value of \$1,000 is not available.—*Mayho v Cotton* 69 SE 289.

HOMICIDE

IN GENERAL, 835.

EXCUSABLE OR JUSTIFIABLE HOMICIDE, 839.

EVIDENCE, 845.

TRIAL, 849.

IN GENERAL.

835. **What are the degrees in homicide, and how distinguished?**

A. Homicide is divided into:

JUSTIFIABLE—where no blame attaches, as in the case of the execution of a criminal.

EXCUSABLE—where there is a slight blame which the law excuses, as in murder in self-defense.

FELONIOUS—which is divided into:

MANSLAUGHTER, or killing without malice.

VOLUNTARY—in heat of passion.

INVOLUNTARY—accidental.

MURDER, or killing with malice.

MURDER IN THE FIRST DEGREE—killing with malice premeditated and deliberated.

MURDER IN THE SECOND DEGREE—all other murder.—

Wharton's Criminal Law Sec 930-938; Con Stat 4200.

836. **How many degrees of murder are there? Define each particular degree and state what is necessary to prove to convict of each.**

A. MURDER IN THE FIRST DEGREE:

A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of wilful, deliberated and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed to be murder in the first degree.—Con Stat 4200.

Where the murder has been committed by means of poison, lying in wait, etc., premeditation and deliberation are presumed. In all other cases not covered by the statute, the state must prove beyond a reasonable doubt that the murder was committed premeditatedly and deliberately and with malice aforethought to convict of first degree murder.—State v Hunt 134 NC 684, 47 SE 16.

MURDER IN THE SECOND DEGREE:

Murder in the second degree is the unlawful killing of a human being by a person who has formed in his mind a purpose, design, or intention unlawfully to kill, with malice, but without deliberation and premeditation.—State v Cameron 166 NC 379, 81 SE 748.

When the killing is admitted by the prisoner or shown by the state, malice is implied, which makes out a case of second degree murder. When this point is reached the burden is on the state to show beyond a reasonable doubt that the prisoner wilfully, with premeditation and deliberation, formed and entertained the fixed design to take the life of the deceased to convict of first degree murder.

MANSLAUGHTER:

Manslaughter is the unlawful killing of a human being without malice, express or implied, and without deliberation and premeditation.—State v Cameron Supra.

In other words, manslaughter is any taking of the life of another which is not covered by the definition of murder in the first degree or murder in the second degree, nor is covered by justifiable or excusable homicide.

837. Suppose A is indicted for the murder of B, and the killing with a deadly weapon by A is admitted, what burden does the law put on A? What burden does the law put on the state to convict of murder in the first degree?

A. When use of deadly weapon is admitted by the defendant, or proved by the state beyond a reasonable doubt, malice is presumed, and a case of second degree murder made out. In such case, the burden is upon the state to prove premeditation and deliberation beyond a reasonable doubt to make a case of first degree murder. The burden is likewise upon the prisoner to show that there was no malice so as to reduce the verdict from second degree murder to manslaughter, or a verdict of not guilty.—State v Hunt 134 NC 684, 49 SE 16; State v Dowden 118 NC 1147, 24 SE 722.

838. What is meant by proof of the corpus delicti?

A. It is proof that a crime has been committed, commonly used in reference to homicide to mean that the proof of the death by violence must be made.—Desty's Criminal Law Sec 123a; 4 A & E Ency Law 309.

EXCUSABLE OR JUSTIFIABLE HOMICIDE.

839. On indictment for murder, is the drunkenness of the defendant at the time of the alleged offense a relevant circumstance on the issue of guilt, and how is it allowed to affect the question?

A. "Intoxication, though voluntary, is to be considered by the jury in a prosecution for murder in the first degree in which a premeditated design to cause death is essential, with reference to its effect upon the ability of the accused at the time to form and entertain such a design, not because, per se, it either excuses or mitigates the crime, but because, in connection with other facts, an absence of malice or premeditation may appear. Drunkenness as evidence of want of premeditation or deliberation is not within the rule which excludes it as an excuse for crime, and a person who commits a crime when so drunk as to be incapable of forming a deliberate or premeditated design to kill is not guilty of murder in the first degree. The influence of intoxication upon the question of the existence of premeditation, however, depends upon its degree, and its effect upon the mind and passions. No inference

of the absence of deliberation and premeditation arises from intoxication, as a matter of law. And intoxication cannot serve as an excuse for the offender, and it should be received with great caution, even for the purpose of reducing the crime to a lower degree."—State v English 164 NC 497, 80 SE 72.

840. Under the laws of homicide when and under what circumstances may a man stand his grounds and slay his adversary?

A. When a person is where he has a right to be and is guilty of no wrong, in bringing on the fight, and the assault is such as to excite the mind of a reasonable man to an apprehension of death or grievous bodily injury.—State v Rowe 155 NC 436, 71 SE 332.

841. In indictments for homicide, what is meant by the right of perfect and imperfect self-defense?

A. "A perfect right of self-defense can only obtain and avail where the party pleading it acted from necessity, and was wholly free from wrong or blame, in occasioning or producing the necessity which required his action. If, however, he was in the wrong—if he was himself violating, or in the act of violating the law, and on account of his own wrong was placed in a situation where it became necessary for him to defend his own wrong, then the law justly limits his right of self-defense, and regulates it according to the magnitude of his own wrong. Such a state or case may be said to illustrate and determine what in law would be denominated the imperfect right of self-defense."—State v Crisp 170 NC 785, 87 SE 511.

842. If one person wrongfully provokes a fight, and, in the progress of the same, kills his adversary, can he maintain the position of perfect self-defense?

A. No, unless he quits the combat and so signifies to his adversary.—Ibid.

843. What is required of one who has wrongfully brought on a fight before he can maintain the position of perfect self-defense?

A. He must have "quitted the combat" and so signified to his adversary.—Ibid; State v Kennedy 169 NC 326, 85 SE 42.

844. Can a person be justified in taking human life merely in the defense of his property?

A. No, not as a general rule. Human life may be taken to prevent robbery or burglary.—IV Black 180; Desty's Criminal Law See 31e.

EVIDENCE.

845. **What is a dying declaration, and for what purposes is it admissible?**

A. Declarations made in view of approaching death. With the one exception given in the following question, dying declarations are only admissible in cases of homicide, and are restricted to the act of killing and the circumstances immediately attending the act and forming a part of the *res gestae*.—State v Laughter 139 NC 488, 74 SE 913.

846. **Are dying declarations admissible as evidence on the trial of civil actions?**

A. Yes, in actions for recovery of damages for death by wrongful act.—Con Stat 160.

847. **What must first be proved before dying declarations are receivable in evidence?**

A. It must be proved that the declarant was under the apprehension of impending death.—State v Laughter 159 NC 488, 74 SE 913.

848. **When dying declarations are properly admitted in evidence, is it open to attack the character of the deceased for truth?**

A. Yes.—State v Thompson 46 NC 274.

TRIAL.

849. **When a man is indicted for murder, of what offenses may he be convicted according as the proof may justify?**

A. He can be convicted of murder either in the first or second degree, or manslaughter.—State v Matthews 142 NC 621, 55 SE 34; Con Stat 4642.

HUSBAND AND WIFE

MUTUAL RIGHTS, DUTIES AND LIABILITIES, 850.

CONTRACTS BETWEEN HUSBAND AND WIFE, 851.

DISABILITIES AND PRIVILEGES OF COVETURE, 854.

WIFE'S SEPARATE ESTATE, 871.

ACTIONS, 885.

MUTUAL RIGHTS, DUTIES AND LIABILITIES.

850. Does the husband retain the "right to chastise his wife with a switch no larger than his thumb" which was long since abolished in England, and if not, when was it abolished, and was it done by statute or judicial decision?

A. "Of a piece with this was the doctrine, also judge-made, for there was never a statute for it, that if a man beat his wife 'with a switch no larger than his thumb' the court would not punish him. The last of these was still held law in this state (State v Black 60 NC 262; State v Rhodes 61 NC 453) till abolished after the Constitution of 1868 by the decision in State v Oliver 70 NC 60 (in 1874) long after this was done in England."—Dissenting opinion of Clark C. J. in *Freman v Belfer* 173 NC 581, 92 SE 486.

CONTRACTS BETWEEN HUSBAND AND WIFE.

851. Can a married woman make a conveyance direct to her husband?

A. Yes, though it is better to convey it to trustee, and he convey it to husband.—*Con Stat* 2515, 2516; *Simms v Ray* 96 NC 87, 2 SE 443.

852. Where there is a controversy between parents for the custody of their child, how are the rights of the parties determined, and what general rule is followed by the courts in such cases?

A. "The father is, in the first instance, entitled to the custody of the child. But this rule of the common law has more recently been relaxed, and it has been said that, where the custody of children is the subject of dispute between different claimants, the legal rights of parents and guardians will be respected by the courts as being founded in nature and wisdom, and essential to the virtue and happiness of society; still the welfare of the infants themselves is the polar star by which the courts are to be guided to a right conclusion, and therefore they may, within certain limits, exercise a discretion for the benefit of the child and in some cases will order it into the custody of a third person for good and sufficient reasons.—*In re Lewis* 88 NC 31."—*Newsome v Bunch* 144 NC 15, 56 SE 509.

853. How may a contract affecting a wife's estate be made under the Code between husband and wife?

A. "No contract between a husband and wife made during coverture shall be valid to affect or change any part of the real estate of the wife, or the accruing income thereof, for a

longer time than three years next ensuing the making of such contract, or to impair or change the body or capital of the personal estate of the wife, or the accruing income thereof, for a longer time than three years next ensuing the making of such contract, unless such contract is in writing, and is duly proved as is required for conveyances of land; and upon the examination of the wife separate and apart from her husband, as is now or may hereafter be required by law in the probate of deeds of *femes covert*, it shall appear to the satisfaction of such officer that the wife freely executed such contract, and freely consented thereto at the time of her separate examination, and that the same is not unreasonable or injurious to her. The certificate of the officer shall state his conclusions, and shall be conclusive of the facts therein stated. But the same may be impeached for fraud as other judgments may be."—Con Stat 2515.

DISABILITIES AND PRIVILEGES OF COVETURE.

854. What title has the husband in the chattels real of his wife?

A. None while she is living. But at common law the chattels real of the wife vested in the husband subject to certain restrictions.—NC Const Art X Sec 6; II Black 434.

855. What rights are conferred upon the husband by the statute in the personal property of the wife upon her death intestate?

A. He has the right of administration and is entitled to receive an equal share with her children.—Con Stat 7, 137.

856. What is the restriction placed by the statute upon the rights of married women to contract? Is there any such restriction upon such rights in the Constitution?

A. "Subject to the provisions of Consolidated Statutes 2515 (see Question 853), every married woman shall be authorized to contract and deal so as to affect her real and personal property in the same manner and with the same effect as if she were unmarried, but no conveyance of her real estate shall be valid unless made with the written assent of her husband, as provided by Section Six, of Article Ten of the Constitution, and her privy examination as to the execution of the same taken and certified as now required by law."—Con Stat 2507, known as the Martin Act.

There is no restriction upon such rights in the constitution except she must have written assent of husband to convey land.—NC Const Art X Sec 6.

857. When is the husband liable, if at all, for the purchases of his wife upon his credit?

A. Husband is liable for his wife's necessities, and for her contracts when acting as his agent.—Clark on Contracts 499.

858. Is the husband liable in damages for his wife's torts?

A. They are jointly liable.—Con Stat 2518; Brittingham v Stadiem 151 NC 299, 66 SE 128.

859. In North Carolina does a husband become liable for his wife's debts or contracts made before marriage?

A. No.—Con Stat 2517.

860. A, as a customer, enters the store of B, a married woman living with her husband, and while in there is injured by the carelessness of C, the minor child of B, acting as her clerk. Can A recover? If so, from whom, and why?

A. The child is in the employment of B, and this makes her liable for his torts which are committed in the course of his employment. The husband is liable jointly with the wife for her torts.—Brittingham v Stadiem 151 NC 299, 66 SE 128.

861. Will the admissions of a wife be competent against her husband, and if so, in what cases?

A. Only when acting for husband as his agent.—Lockhart's Ev Sec 153.

862. Has a married woman the right to contract without her husband's assent and make her property, real and personal, liable for such contract without specifically charging it? And if so, has this been made by statute or judicial decision?

A. Yes.—Warren v Dale 170 NC 406, 87 SE 126; See also dissenting opinion of Clark C J in Satterwhite v Gallagher 173 NC 525, 92 SE 369.

Change made by statute.—Con Stat 2506.

863. If the wife of a grantor in a deed is insane, is there any provision dispensing with the privy examination, and if so, what is it?

A. Yes. He may convey any of his real estate except homestead as if unmarried, except there must be a certificate of the clerk of the Superior Court in which such wife was declared insane, or of the superintendent of an insane institution of this state, certifying under his hand and seal that such wife has been adjudged insane and that her sanity has not been restored.—Con Stat 1004.

864. What is meant by an estate in entirety?

A. "When realty is devised or conveyed to husband and wife, they take by entirety, and upon the death of one the whole belongs to the other by right of survivorship."—*Harrison v Ray* 108 NC 215, 12 SE 993.

865. What are the incidents of such an estate?

A. Survivorship, not capable of partition, interest of neither can be sold for debt; neither can convey any interest therein without the other. All the incidents of this estate result from common law fiction of unity of person of husband and wife.—II Black 182; *Hood v Mercer* 150 NC 699, 64 SE 897.

866. If an estate is given to a man and his wife, how are they seized? What is the consequence of such seizin?

A. They are seized *per tout et non per my*. The consequence of such seizin is an estate by entirety.—*Ray v Long* 132 NC 891, 44 SE 652.

867. In the case of an estate by the entirety, can one of the parties alone make a contract having the effect of creating a lien on the property?

A. No.—*Gray v Bailey* 117 NC 439, 23 SE 318.

868. In an estate by entirety, can a creditor of a husband enforce his debt against the husband's interest during the life of the wife by execution?

A. No.—See Question 865.

869. In an estate by entirety, upon trespass committed, is it necessary for the wife to be a party to such wrong?

A. No. Trespass is a wrong to possession, and husband is entitled to possession.—*West v RR* 140 NC 620, 53 SE 477.

870. If lands are devised or granted to two persons, how do they ordinarily hold, and who receives the income? If the two persons happen to be man and wife, how do they hold, and who receives the entire income from the property during their joint lives? Was this estate by entirety created in this state by statute, or is it a "survival" created by some judge in England (where it has long since been abolished)?

A. "When an estate is conveyed to two or more persons under our law, it makes them tenants in common. There is no exception to this by any statute; but in England (formerly, though not now) an exception was made, not by any statute, but by the opinion of judges who held that, as the law then stood, the property rights of the wife being suspended during coverture, that if a conveyance or devise was made to two

persons who happened to be husband and wife, the husband should have the whole of the estate during his life time and at his death it should go to the survivor. Thus by judicial enactment was created the estate by entireties."—The above was taken from the dissenting opinion of Clark, C J, in *Freeman v Belfer* 173 NC 581, 92 SE 486.

WIFE'S SEPARATE ESTATE.

871. What property rights are secured to a married woman by the constitution of North Carolina?

A. The same as feme sole, except she can not convey land without the written assent of her husband.—NC Const Art X See 6.

872. What is the only instance in which the State Constitution requires privy examination of the wife, and is that as to the conveyance of property of a husband or of a wife?

A. The conveyance of the homestead of the husband.—NC Const Art X See 8.

873. In what instance is the privy examination of a married woman required by the constitution, and as to all other instances, is privy examination statutory and repealable by the legislature?

A. It is required only in the sale of homestead by husband. All other cases statutory and repealable.—Art X See 8.

874. Is there any restriction placed by the constitution of North Carolina upon the rights of a married woman to dispose of her real and personal property? If so, state it accurately.

A. "The real and personal property of any female in this state, acquired before marriage, and all property, real and personal, to which she may, after marriage, become in any manner entitled, shall be and remain the sole and separate estate and property of such female, and shall not be liable for any debts, obligations or engagements of her husband, and may be devised and bequeathed, and, with the written assent of her husband, conveyed by her as if she were unmarried."—Art X Sec 6.

875. What restriction is placed by the Constitution of North Carolina upon the property rights of a married woman?

A. None, except she can not convey her land without the written assent of her husband.—Art X See 6.

876. Does the constitution require the privy examination of a married woman as to the conveyance of her property?

A. No.—Art X Sec 6.

877. What is now left of the former restriction upon a married woman's power to contract? Answer fully.

A. The liabilities of a married woman at common law still exist, as to their person and property, except to the extent of changes by legislature in express terms, or by reasonable construction of the same.—*Brown v Brown* 121 NC 8, 27 SE 998, 38 SE 242.

“The rights of married women in North Carolina as to conveyances and contracts are:

“**As to conveyances of personalty:** ‘There is no restriction whatever upon her right to dispose of her personalty as fully and freely as if she had remained unmarried, either in the constitution or by any statute.’—*Vann v Edwards* 135 NC 661, 47 SE 748, cited with approval by Justice Connor in *Ball v Paquin* 140 NC 91, 52 SE 410.

“**As to conveyance of realty:** The constitution requires only the ‘written assent’ of the husband. The statute superadds only a regulation providing for privy examination, which has been upheld on the ground that it is not an additional requirement, but merely a method of ascertaining if the deed is really her voluntary act.

“**As to contracts:** Laws 1911, Ch. 109 (Con. Stat. 2507), provides that a married woman is authorized to contract and to affect her real and personal property thereby in the same manner and to the same effect as if she were unmarried, excepting only contracts whereby she may incur liability to her husband as to which the provisions of Revisal 2107 are retained.”—*Rea v Rea* 156 NC 529 (533), 72 SE 573.

878. Has a married woman the right to her personal earnings by her needle or otherwise, and how was this until recently? Was the change made by statute, by constitution, or by judicial decision?

A. “Under the law, as it has heretofore prevailed in this state, a husband is entitled to his wife's earnings, the proceeds of her labor, where they are living together as man and wife.”—*Hoke J in Patterson v Franklin* 168 NC 75, 84 SE 18.

“The General Assembly has by express enactment recognized and prescribed that married women are entitled to their own earnings. Laws 1913, Ch 13 (Con Stat 2513) provides, ‘The earnings of a married woman by virtue of any contract for her

personal services, and any damages for personal injuries, or other tort sustained by her can be recovered by her suing alone, and such earnings or recovery shall be her sole and separate property as fully as if she had remained unmarried.'"—Clark C J concurring opinion in *Patterson v Franklin*, supra.

879. **Has a married woman the right to recover in her own name and for her own use and without joining her husband for her personal injuries, as for instance, for the loss of her limb and for loss of her time and the physical anguish caused thereby? If so, has the change been made by statute or judicial decision?**

A. Yes.—*Price v Electric Company* 160 NC 450, 76 SE 502. Change made by statute.—Con Stat 2513.

880. **How may a woman become a free trader in North Carolina?**

A. By antenuptial contract properly proved and registered, or she and her husband shall sign a writing by which she, by his consent, enters herself a free trader. This writing is registered in the office of the Register of Deeds.—Con Stat 2525.

881. **Can a married woman dispose of both her real and personal property by will without the consent of her husband?**

A. Yes.—*Tiddy v Graves* 126 NC 620, 36 SE 127.

882. **Can a married woman bind herself by contracts in personam?**

A. She may make any contract as if unmarried, except in conveyance of land and contracts between husband and wife.—Con Stat 2507.

883. **In case a married woman enters into a contract, to convey her lands and is not privily examined thereto, can specific performance be enforced? If not, is she liable in damages if she refuses to convey, and what would be the measure of damages?**

A. Specific performance can not be enforced, but she is liable in damages for breach of contract.—*Warren v Dale* 170 NC 406, 87 SE 126.

884. **A buys a tract of land from B, a married woman. B is represented in the sale by C, her agent, who makes certain representations and statements inducing the trade, which**

A relies on, and he pays the purchase money, but which statements he ascertains shortly afterwards were false and fraudulent. Has A any remedy against B, and if so, what?

A. A married woman can not take advantage of coverture to perpetrate a fraud. She may be sued for the damage.—*Bell v McJones* 151 NC 85, 65 SE 646.

ACTIONS.

885. When must a husband be joined when the wife is a party to the suit?

A. In all cases except those mentioned in the foregoing question.—*Con Stat* 454.

886. In what cases may a married woman bring an action without joining her husband?

A. When the suit is against the husband or concerning her separate property.—*Con Stat* 454.

887. Can a married woman recover damages for torts without joining her husband? Is he or the wife entitled to the sum recovered?

A. A married woman may sue for damages for torts without joining her husband, and she is entitled to the sum recovered.—*Willis v White* 150 NC 199, 63 SE 942.

888. Can a wife recover damages against the wrong-doer for the beating and maiming of her husband, and why?

A. Not at common law, because she had no right to her husband's services.—*I Black* 442.

889. What is the law in regard to husband and wife testifying against each other in criminal and civil actions?

A. "In any trial or inquiry in any suit, action or proceeding in any court, or before any person having, by law or consent of parties, authority to examine witnesses or hear evidence, the husband or wife of any party thereto, or of any person in whose behalf any such suit, action or proceeding is brought, prosecuted, opposed or defended, shall, except as herein stated, be competent and compellable to give evidence, as any other witness on behalf of any party to such suit, action or proceeding. Nothing herein shall render any husband or wife competent or compellable to give evidence for or against the other in any action or proceeding in consequence of adultery, or in any action or proceeding for divorce on account of adultery except to prove the fact of marriage; or in any action or proceeding for or on account of criminal conversation, except that in actions of criminal conversation brought by the

husband in which the character of the wife is assailed she shall be a competent witness to testify in refutation of such charges. No husband or wife shall be compellable to disclose any confidential communication made by one to the other during their marriage."—Con Stat 1801.

"The husband or wife of the defendant, in all criminal actions or proceedings, shall be a competent witness for the defendant, but the failure of such witness to be examined shall not be used to the prejudice of the defense. Every such person examined as a witness shall be subject to be cross-examined as are other witnesses. No husband or wife shall be compellable to disclose any confidential communication made by one to the other during their marriage. Nothing herein shall render any husband or wife competent or compellable to give evidence against each other in any criminal action or proceeding, except to prove the fact of marriage in case of bigamy, and except that in all criminal prosecutions of a husband for an assault and battery upon his wife, or for abandoning his wife, or for neglecting to provide for her support, it shall be lawful to examine the wife in behalf of the state against her husband."—Con Stat 1802.

890. Suppose the husband is indicted for murder of the wife, is it competent to receive her dying declarations against the husband?

A. Yes.—State v Laughter 159 NC 488, 74 SE 913.

891. A brings an action against the administrator of B to recover damages for a breach of contract and also an action against the heirs of B to recover land. Is the wife of A a competent witness as to the conversation with B affecting the right of recovery in each action? Give reason.

A. In the first case she would be a competent witness, as she has no interest in the event of the action that would bar her testimony as to a transaction with the deceased under Consolidated Statutes 1795.—Helsabeck v Daub 167 NC 205, 83 SE 241.

In the latter case a different rule applies, as the wife, immediately upon the seizin, either in deed or in law of the husband becomes entitled to an inchoate right of dower or estate in the land of the husband, and therefore has an interest in the property dependent upon the result of the controversy, and is not a competent witness under Consolidated Statutes 1795.—Lineberger v Lineberger 143 NC 214 (231), 55 SE 145.

INDICTMENT AND INFORMATION

892. **What is an indictment?**

A. An indictment is the written accusation of one or more persons of a crime or misdemeanor preferred to and presented upon oath to the grand jury.—IV Black 302.

893. **Must an indictment be found by a grand jury of the vicinage of the county where the crime is committed, or is that a matter of statutory enactment?**

A. It is a matter of statute.—State v Lewis 142 NC 626, 55 SE 600.

894. **Is an indictment valid which omits to allege both the time and place at which the offense was committed?**

A. Yes, unless the time and place were of the essence of the crime.—State v Long 143 NC 670, 57 SE 349. (This case was overruled as to bigamous marriages in another state.)—State v Ray 151 NC 710, 66 SE 204.

895. **Is the word “feloniously” necessary to a valid bill of indictment for a felony, and if there is such a requirement, can it be dispensed with by the legislature?**

A. It is usually so held, but the legislature can dispense with such requirement.—State v Harris 145 NC 456, 59 SE 115.

INFANTS

CUSTODY AND PROTECTION, 896.

CONTRACTS, 898.

TORTS, 903.

896. **It what cases are parents and those in loco parentis protected from the consequences of their acts?**

A. If they act in good faith and in a reasonable and moderate manner.—Drum v Miller 135 NC 204, 47 SE 421.

897. **In what cases must a guardian ad litem be appointed?**

A. In all cases where any of the defendants are idiots, lunatics, persons **non compos mentis**, or infants without general or testamentary guardian.—Con Stat 451.

CONTRACTS.

898. **What is the general rule as to the liability of infants for their contracts, and what are the exceptions?**

A. Infants are liable for their contracts for necessities when not living with their parents, or when so living with

parents when such parents are unwilling or unable to furnish such necessities for infant and infant's family. See *Freman v Bridger* 49 NC 1; *Jordan v Coffield* 70 NC 110.

The valid contracts of an infant are:

1. Contracts created by law, or quasi contracts.
2. Contracts entered into under authority of or direction of law.
3. Contracts made in order to do that which he was legally bound to do, or which he could have been compelled to do.—Clark on Contracts 149.

899. **When the contracts of an infant are not binding, are they void or voidable?**

A. Generally voidable.—Clark on Contracts 149.

900. **Are necessities for an infant's wife and children necessities for himself?**

A. Yes.—22 Cyc 597.

901. **Can a person who enters into a contract the day before his twenty-first birthday avoid it, or not, by pleading infancy, and give the reason?**

A. He can not avoid it, because he is of age the day before his twenty-first birthday.—I Black 464; Clark on Contracts 150.

902. **If infancy is pleaded in disaffirmance of a contract, or coverture in repudiation of one, must the consideration received be returned or tendered to make the plea available, and if so, in either case, under what circumstances?**

A. "Neither an infant nor a married woman will be permitted to repudiate a transaction upon the ground of a want of capacity or for other sufficient cause, and at the same time retain and enjoy any benefit derived from it. But the receipt of money or anything else of value by the persons under disability during the course of the transaction does not take away the right of election to repudiate it. Equity will restore his or her property to the disaffirming party, but the person who thus loses it will be permitted to recover any money paid upon the faith of the validity of the transaction, provided the money is then in hand, or the property into which it has been converted can be reached by a proceeding in *rem*."—*Millaps v Estes* 137 NC 525, 50 SE 227.

TORTS.

903. **Is an infant responsible for his torts, and how is it when the tort arises upon contract?**

A. Yes. But he cannot be compelled to comply with the contract by suit for damages for a breach thereof as a tort.—Clark on Contracts 176.

904. **What is the rule as to the liability of infants for their torts?**

A. Infants are liable for their torts.—Smith v Kron 96 NC 392 (396), 2 SE 533.

905. **Is a parent liable in a civil action for the torts of his children?**

A. Parent is not liable for the torts of his infant children, but the infant himself is.—Brittingham v Stadiem 151 NC 299, 66 SE 128; Smith v Kron supra.

906. **Can a parent or child, or both, recover for the tortuous acts to the latter, and if so, what is the measure of the recovery?**

A. Both may recover. Parent may recover expenses incurred from medical attention, nursing, etc., and for loss of service while disabled, and diminished earning capacity during minority. Child may recover for diminished earning capacity during expectancy, and for physical suffering and for mental anguish incurred.—29 Cyc 1642, 1652.

INJUNCTION

907. **What kind of remedy would you seek to stop the commission of waste?**

A. Injunction.—Con Stat 843.

908. **What is an injunction?**

A. An injunction in its legal sense is a remedial writ commanding a defendant to perform some act, or restraining a defendant from the commission or continuance of some act.—Bispham's Equity Sec 399.

909. **How many kinds of injunction are there, and what is the difference between them?**

A. Mandatory: To compel parties to restore things to former order.

Prohibitory: To prevent the commission of some act that would be hurtful to another.—Bispham's Equity Sec 400-401.

910. Define an injunction, and for what causes are they issued?

A. An injunction is an order from a court requiring a person to refrain from a particular act.—Black's Law Dict.

"1. When it shall appear by the complaint that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission, or continuance of some act, the commission or continuance of which, during the litigation, would produce injury to the plaintiff; or,

"2. When, during the litigation, it shall appear by affidavit that a party thereto is doing, or threatens, or is about to do, or is procuring or suffering some act to be done in violation of the rights of another party to the litigation respecting the subject of the action, and tending to render the judgment ineffectual; or,

"3. When, during the pendency of an action, it shall appear by affidavit of any person, that the defendant threatens, or is about to remove or dispose of his property, with intent to defraud the plaintiff."—Con Stat 843.

911. What is a bill of peace?

A. It is a species of injunction, to restrain repeated attempts to litigate the same right.—Bispham's Equity Sec 415.

912. How many kinds are there?

A. Two: To prevent the vexatious recurrence of litigation of numerous parties insisting upon the same right.

To prevent the same individual from reiterating the same unsuccessful claim.—Bispham's Equity Sec 413.

913. What is a bill of interpleader?

A. It is a bill to protect the party who is liable to discharge a debt, duty or obligation from suits by two or more persons severally claiming to be entitled to the benefit of such debt, duty or obligation.—Bispham's Equity Sec 419.

914. What is the difference between a prohibitory injunction and a writ of prohibition?

A. Prohibitory injunction prevents a party to a suit from doing some act prohibited by an order of the court. A writ of prohibition is an order directed to an inferior court to prevent their proceeding with an action.—See Black's Law Dict and also RR v Newton 133 NC 136, 45 SE 549.

915. **State the difference between mandatory and prohibitory injunctions?**

A. A mandatory injunction commands the performance of some positive act. A prohibitory injunction prevents a party to a suit from doing some act prohibited by an order of court.

916. **Has the writer of a letter such a property in it that he is entitled to an injunction to restrain its publication by the person to whom it was addressed?**

A. Yes, unless its publication was necessary to vindicate the character of the recipient, or for the furtherance of justice.—Bispham's Equity Sec 455.

917. **When will a court of equity restrain the commission of a trespass?**

A. Before equity will grant an injunction to restrain the commission of a trespass, two conditions must concur; first the plaintiff's title must be admitted or manifestly appear to be good or it must be established by a legal adjudication, unless the plaintiff is attempting to establish it by an action at law and needs protection during its pendency, and second, the threatened injury must be of such a peculiar nature as to cause irreparable damages.—Lbr Co v Cedar Co 142 NC 411, 55 SE 304.

INSANE PERSONS

918. **Is a lunatic liable in damages for his torts?**

A. Yes.—Moore v Horne 153 NC 413, 69 SE 409.

INSURANCE

919. **A takes out an accident insurance policy and is lynched by a mob. Can there be a recovery on the policy? Give the reason.**

A. Yes, unless there is an express stipulation in the policy to the contrary. Insured, although he might have committed some act which enraged the mob, was in no manner responsible for their taking his life.

920. **A policy of insurance is issued on the life of A, having as a part of it the clause making it non-contestable, except for the non-payment of premiums. A tenders the second premium when due and the company refuses to accept it. What are the remedies of A?**

A. A may consider the policy at an end and recover it at just value; or he may sell in equity to have the policy de-

clared in force and recover the amount payable according to its terms at maturity.—Trust Co v Ins Co 173 NC 558, 92 SE 706.

921. In this connection, suppose a contract for insurance is applied for in New York by a citizen of North Carolina, and is sent to be delivered to him in North Carolina, by the law of which state is the contract to be governed?

A. By the laws of North Carolina.—Con Stat 6287.

922. If a policy is issued to one having an insurable interest and then assigned to one having no such interest, when is it valid and enforceable, if at all, against the company by the assignee?

A. When the assignment is made in good faith and for a valuable consideration and not as a cloak for a wagering transaction or speculation.—Johnson v Ins Co 157 NC 106, 72 SE 847.

923. In the law of insurance what representations of the insured are considered as material, and for which, if false, the policy may be avoided?

A. Every fact which is untruly stated or wrongfully suppressed must be regarded as material, if knowledge of it in the one case or ignorance of it in the other would naturally or reasonably influence the judgment of the insurer in issuing the policy.—Schas v Ins Co 166 NC 55, 81 SE 1014.

924. Name some of the particular relations in which parties have an insurable interest in the life of another.

A. Parent and child, husband and wife, creditor and debtor.—See Johnson v Ins Co 157 NC 106, 72 SE 847.

925. What is an insurable interest sufficient to sustain in favor of the insured, and prevent the policy from being void as a wagering contract?

A. There must be ties of blood or marriages or a contract existing between the parties, the fulfilment of which the death of the insured will prevent.—Trinity College v Ins Co 113 NC 244, 18 SE 175.

926. What is meant by an insurable interest?

A. It is such an interest as would entail pecuniary loss in the case of destruction of property by fire in fire insurance, or death of party in the case of life insurance.—Clark on Contracts 277.—Trinity College v Travelers Ins Co 113 NC 244, 18 SE 175.

INTEREST

927. **When is a party entitled to recover interest?**

A. All sums of money due by contract of any kind whatsoever, excepting money due on final bonds, shall bear interest.—Con Stat 2309.

INTERPLEADER

928. **What is a bill of interpleader?**

A. It is a bill to protect the party who is liable to discharge a debt, duty or obligation from suits by two or more persons severally claiming to be entitled to the benefit of such debt, duty or obligation.—Bispham's Equity Sec 419.

INTOXICATING LIQUORS

929. **A gives B one dollar with which to buy whiskey for him. B procures whiskey from another within this state and delivers it to A without compensation or reward, to accommodate him. Is B indictable? Why?**

A. Yes. B is the agent of the seller of the whiskey.—State v Burchfield 149 NC 537, 63 SE 89.

JOINT TENANCY

930. **Does joint tenancy exist in this state? If so, when?**

A. Joint tenancy has not been abolished in this state, but by statute survivorship has been abolished except in cases of partnerships or other exceptions mentioned in the statute.—Con Stat 1735.

931. **How are joint tenants seized?**

A. They are seized *per my et per tout*.—II Black 182.

932. **How may a tenancy in joint tenancy be severed and destroyed?**

A. By destruction of any of its unities, or by partition.—II Black 185.

JUDGES

933. **Does the State Constitution require that the judges of this or any other court must have license to practice law?**

A. No.

JUDGMENT

IN GENERAL, 934.

LIEN, 946.

ACTIONS ON JUDGMENTS, 953.

IN GENERAL.

934. **What is a judgment, and how many sorts are there?**

A. A judgment is the final determination of the rights of the parties to an action. They are either final or interlocutory.—*Hutchinson v Smith* 68 NC 354; *Con Stat* 592.

935. **What are the general provisions of the statutes *Elegit* and *Merchant*, and what effect did each have upon the land?**

A. By statute *Elegit* (13 Edw. I, Ch. 18) after judgment was obtained the sheriff put the judgment creditor in possession of one-half of the land of the debtor to hold until the rents and profits discharged the debt. By the statute *Merchant* (13 Edw. I) a trader might go before the chief magistrate of a trading town and acknowledge his debt and the creditor was allowed to hold the lands until the debt was paid by the rents and profits.—II *Black* 160, 161.

936. **What is the difference between a void and a voidable judgment?**

A. A void judgment is in legal effect no judgment, as if a judgment be rendered without service.

A voidable judgment is one improperly rendered, but is binding until set aside by a court of competent jurisdiction.—*Stafford v Gallops* 123 NC 19, 31 SE 265; See *Black's Law Dict*; *Black on Judgments* 248.

937. **What is the difference between an erroneous judgment and an irregular judgment?**

A. An irregular judgment is contrary to the practice of the court and may be corrected by a motion in cause. Erroneous judgment is contrary to law, and the remedy is by appeal.—*McKee v Angel* 90 NC 60.

938. **In what does a retraxit differ from a nonsuit?**

A. In nonsuit plaintiff may bring a new action. In retraxit he cannot.—III *Black* 296.

939. **Distinguish between void and irregular and erroneous judgments. How may they be attached or reviewed?**

A. "An erroneous judgment is one rendered according to the course and practice of the courts, but contrary to law;

as where it is for one party when it ought to be for the other, or for too little or too much. An irregular judgment is one contrary to the course and practice of the court, as a judgment without service of process."—*Wolfe v Davis* 74 NC 597.

"Again, judgment rendered against a defendant who has never been served with process, nor appeared in person or by attorney is not voidable, but void, and it may be so treated, whenever and wherever offered, without any direct proceeding to vacate it. The reason is that the want of service of process and want of appearance are shown by the record itself whenever it is offered. It would be otherwise if the record showed service of process or appearance when in fact there had been none. In such case the judgment would be apparently regular, and would be conclusive until by a direct proceeding for the purpose it is vacated.—*Doyle v Brown* 72 NC 393."—*Koone v Butler* 84 NC 221, 222.

940. How do you tender a judgment before trial, and what is the effect of the tender if it is not accepted?

A. The defendant may serve upon a plaintiff an offer in writing to allow judgment to be taken against him for the sum or property or to effects therein specified, and for costs. If plaintiff failed to obtain a more favorable judgment, he can not recover costs, but must pay defendant's from the time of the offer.—*Con Stat* 896.

941. What is the legal effect of a judgment by default and inquiry?

A. It carries costs and nominal damages in favor of the plaintiff.—*Stockton v Mining Co* 144 NC 595, 57 SE 335.

942. In what cases will a judgment by default final be allowed?

A. On failure of defendant to answer as follows:

1. Where complaint sets forth promise to pay sum fixed or which can be computed by terms of the contract.

2. Where the defendant answers and does not deny plaintiff's claim, but sets up counterclaim less than plaintiff's claim, judgment may be for excess.

3. In addition to the above, if the defendant is a non-resident and service is by publication, proof of the claim must be made.

4. In actions for the recovery of real property if no answer is filed, or if undertaking is not given as required by law.—*Con Stat* 595.

943. When may a judgment by default and inquiry be entered, and as to what matters is it conclusive; and when is a party entitled to judgment by default final, distinguishing between the two kinds of judgments as to form and legal effect?

A. A judgment by default final may be had on failure of defendant to answer:

1. If plaintiff's claim is precise and fixed or can be rendered certain by computation.

2. Or when the defendant sets up a counterclaim amounting to less than plaintiff's claim and plaintiff admits the counterclaim.

3. Or in actions for the recovery of real property and the defendant fails to file proper undertaking.—Con Stat 595; Scot v Life Assn 137 NC 515, 50 SE 221.

“There are two kinds of judgment by default—one final, the other interlocutory. In actions **sounding in damages** the interlocutory judgment, which is rendered for want of an answer, is an admission or confession of **the** cause of action; and there follows a writ of inquiry by means of which the damages are to be assessed. There is, it is true, an expression at the end of the opinion in the case of Osborne v Leach 133 NC 432, that may seem inconsistent with the first clauses of that proposition, but all the authorities in this State—and they are numerous—are to the effect that a judgment by default and inquiry admits the cause of action, and the plaintiff is only to prove his damages.—Junge v MacKnight 137 NC 285, 49 SE 474.

944. When is the plaintiff entitled to judgment *non obstanti veridicto*?

A. Judgment *non obstanti veridicto* is a judgment for the plaintiff “notwithstanding the verdict” which has been given for the defendant, which may be done where, after verdict and before judgment, it appears by record that the matters pleaded or replied to, although verified by the verdict, are insufficient to constitute a defense or bar to the action.—Black's Law Diet.

945. What is the effect of a judgment of nonsuit upon the cause of action, and upon the pleas of the statute of limitations?

A. Another action may be brought. If statute of limitations has barred claim before nonsuit, plaintiff may bring new action within one year.—Con Stat 415.

LIEN.

946. Upon what property is a docketed judgment a lien?

A. Upon all real estate of debtor that he now owns or may acquire within ten years, situated in the county in which judgment is docketed.—Con Stat 614.

947. How may a judgment lien upon real property be acquired?

A. By docketing in the office of the clerk of the Superior Court.—Con Stat 614.

948. If no execution has been issued on a judgment within three years, could one be issued thereafter? Give the procedure.

A. "After the lapse of three years from the entry of judgment on the judgment docket, an execution can be issued only by leave of the court, upon motion, with personal notice to the adverse party, unless he is absent or non-resident, or can not be found to make such service, in which case service may be made by publication, or in such other manner as the court directs. This leave shall not be granted unless it is established by the oath of the party, or by the other satisfactory proof, that the judgment, or some part thereof, remains unsatisfied and due. But the leave is not necessary when execution has been issued on the judgment within the three years next preceding the suing for execution, and return thereof unsatisfied in whole or in part."—Con Stat 668.

949. A purchases a tract of land from B in Wake County on June 13th, 1909, taking a deed therefor, which he has recorded on June 15th, 1909. C recovers judgment against B on June 14th, 1909, and has his judgment docketed in the Superior Court on the same day and issues execution. D buys at the execution sale. A is in possession and D sues A for the land. Can he recover? If so, why?

A. Yes. The lien of the judgment is prior to the deed, it having been docketed the day before the deed was registered.—Clement v King 152 NC 456, 67 SE 1023; See Con Stat 614.

950. A recovers judgment against B for \$2,000 which he has properly docketed. B owns four lots of land. On one lot he gave a mortgage to C before A's judgment was obtained, but subsequently on different days, he gave a mort-

gage on a second lot to D, on a third to E, and on a fourth to F. A's judgment, not being paid, execution was issued on it. What right has the mortgage creditors of B, if any, and why?

A. The mortgage of C being registered, had priority over the judgment. The lot last mortgaged might be sold first and the others in inverse order.

951. What is the effect of a docketed judgment upon the homestead when there is no property in excess thereof?

A. It is a lien upon the homestead from the time judgment is docketed.—Jones v Britton 102 NC 166, 9 SE 554.

952. When the owner of an allotted homestead against which there was a docketed judgment sells the homestead, what is the effect upon the judgment lien?

A. The exemption ceases, and homestead may be sold to satisfy judgment lien.—Con Stat 729.

ACTIONS ON JUDGMENTS.

953. When is a judgment dormant, and how may it be revived?

A. A judgment is dormant when execution has not been issued upon it within three years. It can be revived only by leave of court with personal notice to the adverse party.—Con Stat 667, 668; See Question 948.

954. A recovers judgment in Virginia against B, a citizen of North Carolina, after personal service of the process in the state of Virginia. In an action brought on the judgment in North Carolina, what effect is given the judgment, and what provision of the Federal Constitution specially applied?

A. Suit could be brought on the judgment in this state. "Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state."—US Const Art IV Sec 1; Roberts v Pratt 152 NC 731, 68 SE 249; Mottu v Davis 151 NC 237, 65 SE 969.

955. A obtains a judgment in Virginia against C upon a contract which is legal in Virginia and illegal in North Carolina. Can A recover in an action upon the judgment in North Carolina? Give the reason.

A. Yes.—Question 954.

956. What defenses to such judgments are permissible when sued upon in North Carolina?

A. A want of jurisdiction of the Virginia Court, and fraud.—Ibid.

JURY

957. Whence comes the mode of trial by jury, and how is it guaranteed?

A. Trial by jury is of Saxon origin. It developed from the Saxon method of trial by compurgation, which was for the accused to select a certain number of men to prove his innocence. By the time of Magna Charta it had become customary to select twelve men who were acquainted with the facts of the case to decide the issue. This method of trial (by jury) was guaranteed by Magna Charta.—Smith's Elementary Law 326; III Black 23.

958. What is the province of the jury?

A. An issue of law must be tried by the judge, unless it be referred. An issue of fact must be tried by the jury unless trial by jury be waived, or a reference be ordered. Every other issue is triable by the court or the judge thereof, who, however, may order the whole issue, or any specific question of fact involved therein, to be tried by the jury, or may refer it. When a compulsory reference is ordered, either party has the right to have the issues of fact tried by a jury.—Con Stat 556.

959. In what cases does the Constitution guarantee a right of trial by jury, and in what cases may it be waived?

A. In all criminal and civil cases, the right of a trial by a jury is guaranteed, except the legislature may provide other means for the trial of petty misdemeanors with the right of appeal.—NC Const Art 1 Sec 13, 19.

“In all issues of fact, joined in any court, the parties may waive the right to have the same determined by a jury in which case the finding of the judge upon the facts shall have the force and effect of a verdict by a jury.”—NC Const Art IV Sec 13.

960. Can a state by its constitution authorize a trial jury to consist of less than twelve, and dispense with the requirement of unanimity?

A. No.—American Pub Co v Fisher 166 US 464; Capitol Traction Co v Holf 174 US 1.

961. How many peremptory challenges are allowed the state and defendant respectively in capital cases?

A. Four by state and twelve by each prisoner.—Con Stat 4633, 4634.

962. What is the difference between peremptory challenges and challenges for cause? How many of the former are allowed state and defendant in capital cases and other criminal actions not capital? Also, how many are allowed in civil actions?

A. Peremptory challenges are those which are made without assigning any reason, and which the court must allow. A challenge for cause is one made on account of some defect in the qualifications of a juror.—Bouvier's Law Dict.

In capital cases, four by state for each defendant and twelve by each defendant. In other criminal cases, two by state for each defendant, and four by each defendant.—Con Stat 4633, 4634. Four by both plaintiff and defendant in civil actions.—Con Stat 2331.

963. Is the disallowance of a challenge to a juror ground for exception or not when the defendant has not exhausted his peremptory challenges? Give the reason.

A. No. Defendant could have challenged juror peremptorily.—State v Bohanon 142 NC 695, 55 SE 797.

964. What is meant by "polling the jury," and when may the right be exercised?

A. To "poll" a jury is to have each juror assent or dissent from the verdict returned by the foreman and the right to poll a jury after the rendition of its verdict exists in civil as well as criminal cases.—Smith v Paul 133 NC 66, 45 SE 348.

JUSTICES OF PEACE

965. What are the provisions of the Constitution of North Carolina as to the jurisdiction of justices of the peace?

A. "The several justices of the peace shall have jurisdiction, under such regulations as the general assembly shall prescribe, of civil actions founded on contract wherein the sum demanded shall not exceed two hundred dollars, and wherein the title to real estate shall not be in controversy; and of all criminal matters arising within their counties when the punishment cannot exceed a fine of fifty dollars or imprisonment for thirty days. And the general assembly may give justices of the peace jurisdiction of other civil actions wherein the value of the property in controversy does not exceed fifty dollars."—Art IV Sec 27; See State v Upchurch 72 NC 146.

966. Is the jurisdiction of justices of the peace in civil action for breach of contract when it exists exclusive?

A. Yes.—Con Stat 1473.

967. **How is this in civil actions for tort?**

A. It is concurrent.—Con Stat 1474.

968. **Can the legislature take from the justices of the peace their criminal jurisdiction? If so, in what cases?**

A. Cannot take away jurisdiction of crimes in which punishment cannot exceed fifty dollars fine, or thirty days in prison, or those powers unequivocally prescribed by the constitution of the state.—NC Const Art IV Sec 27.

969. **By what process is an action begun in a justice court?**

A. In civil action by summons. In criminal action by warrant.

970. **What is the legal effect of “splitting a cause of action” and recovering judgment for a part of the claim?**

A. When an account consists of divers and separate dealings and at different times or is a running account from year to year, either for goods sold, work done or material furnished, it is well settled that the creditors may “split it up” and proceed on each separate item before a justice. But a creditor can not “split up” an account so as to give a justice of the peace jurisdiction when the dealing between himself and the debtor was continuous, and nothing appears on the face of it, or in the account rendered, indicating that either party intended that each item should constitute a separate transaction.—*Magruder v Randolph* 77 NC 79; *Copeland v Tel Co* 136 NC 11, 48 SE 501.

971. **Has a justice of the peace jurisdiction to sentence a party convicted in his court to hard labor in the penitentiary or on the roads?**

A. Cannot sentence to penitentiary, but may to county jail and he may be worked on roads when provisions are so made for working convicts and prisoners imprisoned for crime and costs in criminal matters.—Con Stat 1359.

972. **When the statute prescribes in a criminal matter a punishment not to exceed a fine of fifty dollars or imprisonment for one month, what court has jurisdiction to finally determine?**

A. A justice court shall finally determine.—NC Const Art IV Sec 27; Con Stat 1481.

LANDLORD AND TENANT

973. **Define an estate for years.**

A. An estate for years is a contract for the possession of land or tenements for some determinate period.—II Black 140.

974. **How does it differ from a lease?**

A. A lease is a contract by which the estate for years is created.—II Black 143.

975. **What is rent?**

A. A certain sum rising yearly out of lands and tenements corporeal.—II Black 41.

976. **Define a lease.**

A. A lease is properly a conveyance of lands or tenements (usually in consideration of rent or other annual recompense) made for life, for years, or at will, but always for a less time than the lessor had in the premises.—II Black 317.

977. **What is the difference between an assignment and a sub-letting?**

A. A lease is the conveyance of an estate for a definite period of time. In cases of assignment the lessee transfers all his interest in the estate; in sub-letting he merely grants an interest to sub-lessee without a surrender of all his rights.—II Black 317; *Krider v Ramsey* 79 NC 354.

978. **How may an estate for years be terminated?**

A. By expiration of the term, by surrender, and by forfeiture.—II Black 144.

979. **What is a tenancy at will?**

A. It is where lands and tenements are let by one man to another to have and to hold at the will of the lessor.—II Black 145.

980. **What are its incidents?**

A. Tenant is entitled to emblement unless he terminates tenancy; is entitled to estovers; estate may be terminated by either party without notice.—*Hawley & McGregor on Real Property* 23.

981. **What is an estate at sufferance?**

A. It is where one comes into possession of land by lawful title, and afterwards keeps it without any title at all.—II Black 150.

982. What is the difference between an estate at will and an estate at sufferance?

A. An estate at will is where lands and tenements are let by one man to another, to have and to hold at the will of the lessor. An estate at sufferance is where one comes into possession of land by lawful title but keeps it afterwards without any title at all.

An estate at sufferance may be said to be an estate at will after the expiration of an estate for years.—II Black 145, 150.

983. What is an estate from year to year, and how does it arise, and how may it be terminated?

A. "A tenancy from year to year is a species of term for years, from which, however, it is distinguished, inasmuch as the duration of the term is not limited. It is distinguished from a tenancy at will, inasmuch as it is raised only by construction of law as a substitute for an estate at will; therefore, although **prima facie**, all leases for uncertain terms create a tenancy at will, Courts of Law have for a long time construed such leases to constitute a tenancy from year to year, especially where an annual rent is reserved."—Kitchen v Pridgen, 48 NC 50.

A tenancy from year to year may be terminated by a notice to quit given one month or more before the end of the current year of the tenancy.—Con Stat 2355.

984. What is the doctrine of emblements?

A. The right that the tenant or his personal representative has to growing crops when estate is terminated by no act of tenant during the time of its growth.—II Black 122, 123.

985. Can a tenant in possession dispute his landlord's title to the land? If so, when and under what circumstances?

A. He cannot until twenty years after termination of tenancy, or where there has been no written lease, twenty years after last payment of rent.—Con Stat 433.

986. When one has acquired and holds the possession of land as tenant, can he attorn to the owner of the true and paramount title, and thereby defeat the landlord's right to possession at the end of the term?

A. No.—Farmer v Pickens 83 NC 549.

987. A leases a house to B by written agreement in which there is no covenant as to repairs, and during the tenancy the roof leaks, so as to render the upper story of the house uninhabitable. Who must make the repairs?

A. In absence of agreement the landlord is under no obligation to his tenant to keep the premises in repair.—Smithfield Imp Co v Coley-Barden 156 NC 255, 72 SE 312.

988. Is the landlord or the tenant liable for injuries to others caused by the defective or dangerous condition of the premises held under the lease?

A. As a general rule, the tenant, but this rule is subject to exceptions.—Cooley on Torts 609; Knight v Foster 163 NC 329, 80 SE 377.

LARCENY

989. What were the subjects of larceny at common law?

A. Tangible movable chattels only.—IV Black 232.

990. What is the distinction between an indictable trespass and larceny?

A. Forceful trespass consists in the entering upon the land in the actual possession of another, or the high-handed invasion of the rights of another, he being present and forbidding it.—State v Davenport 156 NC 596, 72 SE 987.

Larceny is the felonious taking and carrying away of the movable goods and chattels of another.—State v Craig 89 NC 475; Con Stat 4249.

The distinction is that trespass is a crime against the possession, not ownership, of another—applies to both real and personal property, and is a misdemeanor (State v Davenport, supra), while larceny is a crime against the possession and ownership, applies only to movable chattels, and is a felony.

991. What is the distinction between larceny and embezzlement?

A. The difference between larceny and embezzlement is that in larceny there must be a trespass, while that is not necessary in embezzlement.—State v McDonald 133 NC 680, 45 SE 582.

LIBEL AND SLANDER

992. What is the difference in their nature and results between libel and slander?

A. "Libel is written defamatory matter and slander is spoken. Libel may be prosecuted criminally as well as civil action brought. In slander, except in cases of slander of an innocent and virtuous woman, the only remedy is by civil action for damages.—Cooley on Torts 204; Con Stat 4229, 4230.

Note: "A libel is a malicious publication in printing or writing, or by signs or pictures, tending to blacken the memory of the dead or the reputation of the living, and to expose them to public hatred, contempt or ridicule. A libel is indictable as a crime and also the subject of a civil action for damages. In the absence of a statute proving the truth of the matter published, which is called justifying, is no defense to

either the criminal or civil action for libel, the maxim of the law being, 'The greater the truth, the greater the libel.' The distinction between libel and slander is this: libel is written or printed; slander is only spoken, or, as it is sometimes expressed, *a la Irish*, written slander is libel, while oral libel is slander."—Mordecai's Remedies, Introduction lili; Simmons v Morse 51 NC 6.

993. In the law of defamation, what is meant by words actionable per se, and what words are actionable per se?

A. It means such words as give rise to an action without proof of special damages. Words actionable per se are false and malicious statements about a person which

1. Expose him to indictment or penalty, or
2. Exclude him from society, or
3. Injure him in his business.—Hudnell v Lbr Co 133 NC 169, 45 SE 532.

994. What must plaintiff allege and prove in an action for slander if the words are not actionable per se?

A. Must allege and prove that he has sustained a pecuniary loss.—Cooley on Torts 204; See Questions 993, 995.

995. For what words may an action for slander be maintained?

A. For false and malicious statements about a person which

1. Expose him to indictment or penalty, or
2. Exclude him from society, or
3. Injure him in his business.

Note: Some of the leading authorities give a more elaborate enumeration of words which are actionable per se, but they are all included in the above classification.—See Cooley on Torts 196; Pollock on Torts 206; III Black 123.

996. What is the difference between absolute and qualified privilege?

A. In the case of persons absolutely privileged, no civil action can be brought against them by the party injured by their false statements, even though malice is charged, but he must be left to be dealt with by the criminal law. The case of parties conditionally privileged applies to those parties whose utterance or publication is on a lawful occasion, but they have abused their power. No action will lie for false statements made by them unless it is first shown that they were both falsely and maliciously made.—Cooley on Torts 211-214; Ramsey v Cheek 109 NC 270.

LIENS

997. What is a lien at common law?

A. It is the right of one man to retain the property in his possession belonging to another until certain demands of the party in possession are satisfied.—Black's Law Dict.

LIFE ESTATES

998. State the two different modes by which a life estate may be created, and classify the estates created under each.

- A. Conventional life estates created by act of the parties:
 For life of tenant.
 For life of another.

Legal life estates arising by operation of law:

- Tenancy in tail after possibility of issue extinct.
 Curtesy.
 Dower.—II Black Chap 8.

999. If a tenant of realty *per autre vie* die before the *cestui qui vie*, what does his interest become, and to whom does it go?

- A. It becomes an estate of inheritance, and if not devised, goes to the heirs at law of the deceased owner.—Con Stat 1664, Rule 11.

1000. What incidents at common law attach to a tenancy for life?

- A. Estovers and emblements.—II Black 144.

1001. Upon the death of the life tenant, who will take the emblements?

- A. At common law, the personal representative. Under our statute the rents are divided between the remainderman and the personal representative in proportion to the time elapsed before the death of the tenant.—II Black 122; Con Stat 2346.

1002. To what estates does the doctrine of emblements apply, and to what kind of crops, *fructus naturales*, *fructus industriales*, or both?

- A. It applies to estates for years and for life, and to *fructus industriales* only.—II Black 122, 123.

LIMITATION OF ACTIONS

1003. Does the statute of limitations act upon the right or upon the remedy?

- A. Upon the remedy.—*Arrington v Arrington* 127 NC 190 (197). 37 SE 212.

1004. In how many ways can a plaintiff prove title in an action to recover land? Name them.

- A. As against the state:

1. Adverse possession for thirty years.
2. Adverse possession for twenty-one years under color of title.

As against a person:

1. Adverse possession for twenty years.
2. Adverse possession under color of title for seven years.
3. Connected chain of title from grant.
4. Title by estoppel.
5. By showing in himself a better title from the same source.—*Mobley v Griffin* 104 NC 112, 10 SE 142.

1005. **What is the statute of limitations as to an action for a tort?**

A. Three years for most torts; one year for an action for libel, assault, assault and battery, or false imprisonment; six months for an action for slander.—Con Stat 441, et seq.

1006. **Can the legislature shorten the period of the statute of limitations, which is applicable to an existing contract, without impairing its obligation, and if the power exists, is there any restriction upon it?**

A. If a reasonable time is given for the commencement of the action before the statute works a bar, it is valid.—*Culbreth v Downing* 121 NC 205, 28 SE 294.

1007. **When does the statute of limitations begin to run?**

A. From the accrual of the right of action.—*Shankel v Ingram* 133 NC 254 (259), 45 SE 578.

1008. **When is an action deemed to have commenced so as to take the case out of the operation of the statute?**

A. When summons is issued.—Con Stat 404.

1009. **Do partial payments on bills, bonds and promissory notes arrest the operation of the statute of limitations as to endorsers? If so, give the reason for the same.**

A. "Payments made by the maker of a commercial paper will not repel the bar of the statute of limitations as to endorsers."—*Houser v Fayssoux* 168 NC, 183 SE 692.

1010. **Will a part payment of a promissory note by a payee who has endorsed it stop the running of the statute of limitations as to the maker?**

A. No.—*LeDuc v Butler* 112 NC 458, 17 SE 428.

1011. Does the statute of limitations begin to run against an action by creditors to enforce against the stockholders liability on account of their stock, and if so, when does it begin to run?

A. The statute does not begin to run until a call is made.—*Hawkins v Glenn* 131 US 319; *Clark on Corps* 593.

1012. Does coveture stop the running of the statute of limitations against a married woman?

A. No.—*Con Stat* 407, 408.

1013. If the person entitled to commence an action for the recovery of real property be an infant or insane or imprisoned on a criminal charge, when may such person commence his action?

A. Within three years from the removal of such disability.—*Con Stat* 407.

1014. When does the statute begin to run in such cases?

A. From the removal of such disability.—*Con Stat* 407.

1015. In an action brought to recover a balance upon an open, mutual and current account, when is the cause of action deemed to have accrued so as to start the statute of limitations running?

A. From the time of the latest item proved in the account on either side.—*Con Stat* 421.

1016. In case of a current store account kept by a merchant with credits by payments from time to time, is this a mutual account within the proper meaning of the term, and how is the statute of limitations applied to such a claim?

A. Yes. Statute begins to run from date of last entry on account.—1 *Cyc* 363; *Question* 1015.

1017. A stole a diamond from B. Several years thereafter B waiving the tort, sued A for the value of the diamond. The Statute of Limitations is pleaded by A. When would the Statute begin to run, and in what time would the action be barred?

A. Action would be barred in three years after the discovery of the misappropriation of the diamond by A.—*Con Stat* 441 (4); *Ritch v Oates* 155 NC 631, 29 SE 902.

1018. Against what classes of parties does the statute of limitations never run with regard to land?

A. Railroads, plankroads, turnpikes, etc.—Fully set out in *Con Stat* 434, 435.

1019. Is the statute of limitations open as a defense to a foreign corporation doing business in this state and complying with the laws of this state?

A. Yes.—*Volivar v Cedar Works* 152 NC 656, 68 SE 200.

1020. When the statute of limitations is pleaded, upon whom does the burden of proof rest?

A. The party against whom pleaded.—*House v Arnold* 122 NC 220, 29 SE 333.

MALICIOUS PROSECUTION

1021. When will an action lie for malicious prosecution, and what is the plaintiff required to prove?

A. An action will lie for malicious prosecution when the action has been brought against another without cause and with malice. It must be proved:

1. That the suit or proceeding has been instituted without any probable cause therefor.

2. That the motive in instituting it was malicious.

3. That the prosecution has terminated in favor of the accused.—*Cooley on Torts* 181.

1022. Distinguish between malicious prosecution and malicious abuse of process.

A. In malicious prosecution it must be shown that an action has been instituted without probable cause, from malice, and that a damage has been sustained and that the proceeding has terminated. In malicious abuse of process there must be shown an ulterior purpose, some act done in the use of process not proper in the regular prosecution of the case, but it is not necessary to show want of probable cause, nor that the proceeding has terminated.—*Stanford v Grocery Co* 143 NC 419, 55 SE 815.

1023. What must be proved to sustain an action for malicious prosecution?

A. It must be proved that ill-will or malice existed against plaintiff personally.—*Savage v Davis* 131 NC 159, 42 SE 571.

MANDAMUS

1024. May the courts in any case by mandamus direct the public treasurer to pay an admittedly valid debt of the state when there is no existing act of the legislature directing payment?

A. No.—NC Const Art XIV Sec 3.

1025. **What is the practice when the plaintiff seeks to enforce a money demand by mandamus?**

A. In all such applications when the plaintiff seeks to enforce a money demand, the summons, pleading and practice shall be the same as prescribed for civil actions.—Con Stat 867.

MARRIAGE

1026. **Is a marriage valid without a license issued by a register of deeds?**

A. Yes.—Maggett v Roberts 112 NC 71, 16 SE 919.

1027. **If a white person and a colored person are married in a state where such marriage is legal and come to this state to reside, would the marriage be valid here?**

A. Yes.—State v Ross 76 NC 242.

1028. **Suppose in such case the man resided here and went to another state to contract the marriage with a woman living there and brought his wife back with him, would the marriage be valid here?**

A. Yes, unless this was a device for evading the laws of this state.—Ibid.

MARSHALLING

1029. **Out of what does the doctrine of marshalling grow?**

A. The doctrine of marshalling grows out of the principal that a party who has two funds out of which to satisfy his demands shall not, by his election, disappoint a person having only one.—Bispham's Equity Sec 340.

1030. **What is the difference between subrogation and marshalling?**

A. See Questions 1029 and 1304.

1031. **If A and B own a tract jointly, and each owns a tract individually, and they jointly mortgage all three tracts to secure a debt of A, in what order should the three tracts be sold under foreclosure proceedings, and what is the term applied to such adjustment?**

A. The tract belonging to A individually should be sold first, and then the tract belonging to them jointly, and then the tract belonging to B. This is known as marshalling.—Bispham's Equity Sec 340.

1032. **In marshalling is the puisne creditor's equity against the paramount creditor or the debtor?**

A. Against the debtor.—Adams' Equity 272.

MASTER AND SERVANT

MASTER'S LIABILITY FOR INJURY TO SERVANT, 1035.
LIABILITY FOR INJURIES TO THIRD PERSON, 1046.

1033. **Explain the rule as to an independent contractor, and when will his negligence be imputable to his employer?**

A. An "independent contractor" is one who in the exercise of an independent employment contracts to do a piece of work according to his own methods, without being subject to his employer's control, except as to the results of the work.—*Harmon v Contracting Co* 159 NC 22, 74 SE 632.

The defense of independent contractor is not available where the thing contracted to be done is necessarily attended with danger, or will probably become a nuisance.—*Dunlap v Raleigh etc R Co* 167 NC 669, 83 SE 703.

1034. **If a master discharge his servant without good cause before the expiration of the term for which he is hired, what is the measure of damages?**

A. The difference between what he was to receive from the master and what he did receive, or what he could have received from due diligence.—*Markham v Markham* 110 NC 356, 14 SE 963.

MASTER'S LIABILITY FOR INJURIES TO SERVANT.

1035. **What is the duty of an employer towards his employees with regard to conditions under which they work and the tools and instruments supplied them with which to do it?**

A. "An employer owes to his employees the duty to be reasonably careful to provide safe appliances and machinery, a safe place in which to work, and a reasonably safe way for getting to and from his work."—*Myers v Lumber Co* 129 NC 252, 39 SE 960; *Cochran v Mills Co* 169 NC 57, 85 SE 149.

1036. **What are the usual requirements of an employer for the safety of the employees in the selection of machinery, appliances, etc.?**

A. He should furnish the employee with reasonably safe machinery with which to work, such as is in general use, and keep the same in reasonable repair. He must furnish a reasonably safe place in which to work.—*Walker v Mfg Co* 157 NC 131, 72 SE 974; *Deligny v Furniture Co* 170 NC 189, 86 SE 980.

1037. What is the duty of an employer as to the inspection of tools and appliances, and instructions to his employees?

A. If tools and appliances are complicated, employer must inspect them and keep them in repair, but if simple, as a hammer or a wrench, the employee having equal opportunity with the employer to know the condition of the tools, the rule does not require inspection. Instructions should be given to green hands, as to the use and danger of complicated appliances.—*Mereer v RR* 154 NC 399, 70 SE 742; *Wiggins v RR* 154 NC 577, 70 SE 932; *Rogerson v Hantz* 174 NC 27, 93 SE 376.

1038. Can an employee recover damages if injured while disobeying a rule of the employer? If not, why, and if so, under what circumstances?

A. Not unless the rule had been habitually disobeyed with the knowledge of the employer.—*Bordeau v RR* 150 NC 528, 64 SE 439.

1039. What is the doctrine of fellow servant?

A. All persons engaged under the same employer for the purposes of the same business are fellow servants, and master is not liable for injuries received by one servant on account of negligence of another, unless the master is negligent in employing incapable men.—*Walters v Lbr Co* 165 NC 388 (391), 81 SE 453.

1040. What is the general rule as to the master's liability for injuries received by a fellow servant from a fellow servant?

A. He is not liable generally, but may be shown to be if he was aware of the incompetency or other unfitness of servant causing injury.—*Walters v Lbr Co* supra.

1041. At common law, what is the doctrine applicable for injuries caused by the negligence of a fellow servant?

A. Defendant was not liable for injuries caused by the negligence of a fellow servant at common law.—*Williams v RR* 128 NC 286, 38 SE 893.

1042. What is the general rule as to the liability of an employer for injuries to an employee caused entirely by the negligence of a fellow servant? Is there any exception, and if so, how created?

A. Employer not liable for the negligence of a fellow servant, except as to the employees on railroads.—*Con Stat* 3465.

1043. **Suppose an employee is wrongfully injured, and the negligence of an employer and a fellow servant concur in producing the injury, who is responsible?**

A. Employee may recover judgment from either or both.—*Gregory v Oil Co* 169 NC 454, 86 SE 162.

1044. **What is assumption of risk?**

A. It means that a servant in a contract for his services assumes the ordinary risks incident to the business.—*Biglow on Torts* 331; *Marable v RR* 142 NC 557, 55 SE 355.

1045. **In an action for an injury to an employee in a cotton mill when the plaintiff is under the age prescribed by statute, can the defendant set up contributory negligence or not? Give reason.**

A. "Under the age prohibited by statute, the presumption is that the child injured while working in a factory or manufacturing establishment is incapable of contributory negligence, subject to be overcome by evidence in rebuttal under proper instructions from the court."

Because such child is presumed to be incapable of apprehending the danger created by others.—*Houser v Furniture Co* 174 NC 463, 93 SE 961.

LIABILITIES FOR INJURIES TO THIRD PERSONS.

1046. **When is a master liable for the torts of his servants? Give instances of liability and non-liability.**

A. The master is liable when the servant is in the discharge of his duty as a servant, or when the act is done in connection with his master's business.—*I Black* 431.

A conductor on a train kissed a female passenger against her will. Master is liable. The same man kissed the same woman in a hotel not connected with the railroad. Master is not liable.—*Strother v RR* 123 NC 197, 31 SE 386.

1047. **What is the basis of the liability of the master for the torts of his servant against third persons?**

A. The principle, *respondeat superior*, is the basis of the liability of the master for the torts of his servant to third persons.

1048. **To what extent is a business corporation liable for the negligence of its servants?**

A. It is liable for all done by its authority, express or implied, and those done in connection with and in furtherance of its business.—*Jones v RR* 150 NC 473, 64 SE 205; *Moore v RR* 165 NC 439 (447), 81 SE 603.

1049. The owner of a lot abutting on a street engages in building a house near the street, hires carpenters and assistants, and one of the employees negligently allows a piece of timber to fall from the building which strikes a third person and injures him while passing along the street. Is the owner responsible in damages to the party injured?

A. Yes, the master is liable for the negligence of his servant.—I Black 431.

MINES AND MINERALS

1050. Can the owner of land convey a fee simple title to the mineral interests therein, as separate and distinct from the land itself?

A. Yes.—72 Cyc 628.

MORTGAGES

CONSTRUCTION AND OPERATION, 1059.

TRANSFER OF PROPERTY MORTGAGED, 1061.

FORECLOSURE, 1062.

1051. What is a mortgage?

A. A conditional conveyance of land, designed as a security for the payment of money, the fulfillment of some contract or the performance of some act, and to be void upon such payment, fulfillment or performance.—Black's Law Dict.

1052. In what respect does a deed differ from a mortgage? When may a deed in effect be a mortgage?

A. A mortgage has a clause of defeasance in it. A deed may be in effect a mortgage when the clause of defeasance is omitted by mistake, or when the deed is intended by the parties to operate as a mortgage.—Sandlin v Kearney 154 NC 596, 70 SE 942.

1053. In case of a mortgage, in whom is the legal title vested?

A. In the mortgagee.—Bispham's Equity Sec 21; Kiser v Combs 114 NC 640, 19 SE 664.

1054. What is the difference between a conditional sale and a mortgage?

A. In a mortgage the legal title is conveyed to secure the debt or other liability and the mortgagor has the right to redeem; while in a conditional sale, the sale does not take effect

until some condition therein specified is performed.—See *Hicks v King* 150 NC 270, 64 SE 125; *Hamilton v Highlands* 144 NC 279, 56 SE 929.

1055. What is the distinction between a legal and equitable mortgage?

A. A legal mortgage is a mortgage on its face, and in due form. An equitable mortgage is an obligation in the nature of a lien that equity will construe as a mortgage.—*Bispham's Equity* Sec 161.

1056. Explain the meaning and significance of the maxim, "Once a mortgage, always a mortgage."

A. It means that the equity of redemption cannot be waived or conveyed by any subsequent act between the parties.—*Bispham's Equity* Sec 153; *Poston v Jones* 122 NC 536, 29 SE 951.

1057. What is a defeasance?

A. An instrument accompanying a bond, recognizance or judgment, containing a condition which, when performed, defeats or undoes it.—II Black 342; Black's Law Dict.

1058. From what time are mortgages and deeds of trust good against creditors?

A. From time of registration.—Con Stat 3311.

CONSTRUCTION AND OPERATION.

1059. Will equity ever treat a deed absolute on its face as a mortgage?

A. Yes, when it is alleged and proved by testimony that is clear, cogent and convincing that the instrument in question was in fact intended to be a security for a debt or obligation, then equity, looking to the intention of the parties, will construe it as a mortgage.—See *Bispham's Equity* Sec 470. There seems to be a conflict between the cases on this subject. Compare *Frazier v Frazier* 129 NC 30, 39 SE 634, and *Fuller v Jenkins* 130 NC 554, 41 SE 706.

1060. Suppose A gives a note for \$1,000 secured on his land. When the note falls due he pays \$500 and gives a new note for \$500 payable at a future date to the same creditor. Is the lien of the mortgage released?

A. No.—27 Cyc 1411.

TRANSFER OF PROPERTY MORTGAGED.

1061. What is the legal effect of a conveyance by a mortgagor of the land described in a mortgage to another, subject to the mortgage?

A. Only the equity of redemption is conveyed.—*Parker v Banks* 79 NC 480.

FORECLOSURE.

1062. Suppose A makes a direct mortgage to B, with power of sale, and in default of payment, B executes the power and conveys to C, who bought in the land for B, and conveys it to B. Is the equity of redemption foreclosed? What are A's rights and remedies, if any, against B?

A. Equity of redemption is not foreclosed, and A may within ten years set up his equity of redemption.—*Rich v Morrissey* 149 NC 37, 62 SE 762.

1063. Suppose a mortgagee takes possession of the mortgaged premises, what is the rule of accountability as to rents and profits?

A. "He must account to the mortgagor for the 'highest fair rent, and he becomes responsible for all such acts or omissions as would, under the usual leases, constitute claims on an ordinary tenant,' because by his entry and possession he makes himself 'tenant of the land,' and it is but just and reasonable that he should be held liable for its rents and profits to the mortgagor."—*Green v Rodman* 150 NC 176 (179), 63 SE 732.

1064. Define an equity of redemption.

A. Originally it was the right the mortgagor had to redeem his land after foreclosure, and was enforceable only in the courts of equity. Now it also means the estate the mortgagor has in the lands after the mortgage is given.—*Bispham's Equity* Sec 21.

MUNICIPAL CORPORATIONS

1065. May a municipal corporation, by legislative sanction, lend its financial aid to undertakings of a semi-public character? Is the consent of qualified voters necessary?

A. Yes, but such legislation must conform to requirement of State Constitution, Article II, Section 14. Consent of a majority of the qualified voters would be necessary.—*Graves v Commrs* 135 NC 49, 47 SE 134.

1066. **Is a municipal corporation liable civilly or criminally, for the unlawful acts of its police officers? Give your reason.**

A. A policeman, though appointed by the mayor and aldermen of a city, is a state officer, and not an officer of the city, for whose torts such city is liable, in the absence of statute imposing liability.—*McIlhenny v Wilmington* 127 NC 146, 37 SE 187.

While a municipality is not liable for personal injuries resulting from the exercise of its governmental powers it is liable for damage of property caused by the torts of its officers in discharging its governmental functions, under the doctrine of *respondeat superior*.—*Metz v Asheville* 150 NC 748, 64 SE 881, 22 LRA 940 cited in note in 47 LRA NS 138.

1067. **Can the officers and agents of a county be held individually liable to one who is injured by failure on their part to perform their official duties, and under what circumstances?**

A. Officers are held liable in damages for injuries caused by ultra vires acts, and for neglect to perform duties imposed upon them by statute.—*Barger v Hickory* 130 NC 550, 41 SE 708; *Amy v Barkholder* 11 Wall (US) 136; 20 L Ed 101.

1068. **Has the legislature power to enact a valid law compelling a municipal corporation to provide or pay for a city park, or other like expense?**

A. No.—NC Const Art VII, Sec 7, *Sprague v Commrs* 165 NC 603, 81 SE 915.

1069. **Has the legislature the power to enact a valid statute directing a municipal corporation to pay or provide for the debts incurred for necessary expenses, and can such a statute be enforced by the courts, and by what process?**

A. Yes. By mandamus.—*Highway Commission v Webb* 152 NC 710, 68 SE 211; *Commrs v McDonald* 148 NC 125, 59 SE 348.

1070. **Can a municipal corporation be held liable civilly to an individual for a tort committed by its employees or agents, in the exercise of a governmental function? If so, under what circumstances?**

A. Not except when made so by statute.—*Harrington v Greenville* 159 SE 632, 75 SE 849.

1071. **Can a county be ordinarily held liable to one who is injured by the negligence of its officers or agents? Give reason.**

A. "Counties in a strictly legal sense are rather instrumentalities of government than municipal corporations, like

cities or towns, with corporate powers to execute their purposes, and are not liable for damages in the absence of statutory provisions giving a right of action against them."—*Pritchard v Commrs* 126 NC 904, 36 SE 353.

1072. Can a city engaged in the manufacture and sale of electricity to its citizens be held responsible for the negligence of its employes in the course of such employment?

A. Yes.—*Harrington v Wadesboro* 153 NC 437, 69 SE 399.

1073. Is a municipal corporation liable civilly for the failure to pass ordinances, or for not enforcing those enacted, for the suppression of nuisances?

A. No.—*Hull v Roxboro* 142 NC 453, 55 SE 351.

1074. Can a municipal corporation in the exercise of governmental functions create a nuisance causing substantial damages to the property of an individual owner without being subject to an action therefor?

A. No.—*Jones v Wilkesboro* 150 NC 646 (650), 64 SE 860; *Hines v Rocky Mount* 162 NC 409, 78 SE 510.

NAVIGABLE WATERS

1075. Is the land covered by navigable waters subject to entry and grant under our statute, and if so, for what purpose and to what extent?

A. Not subject to entry except for the purpose of erecting wharves, and then only so far as the deep water mark and shall be confined to straight lines, including only the fronts of the tracts of the persons taking such entry.—*Con Stat* 7540.

NEGLIGENCE

ACTS CONSTITUTING NEGLIGENCE, 1078.

PROXIMATE CAUSE, 1081.

CONTRIBUTORY NEGLIGENCE, 1084.

ACTIONS, 1093.

1076. Define an actionable negligence.

A. The omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or something which a reasonable and prudent man would not do.—*Black's Law Dict* citing *Nitroglycerine Case*, 15 Wall (US) 536, 21 L Ed 2061.

The doctrine of negligence may be well crystallized and expressed in the words of the golden and unselfish rule, "What-

soever ye would that men should do to you, do you even so to them.'—Walker, J, in *Deligny v Furn Co* 170 NC 189 (200), 86 SE 980.

1077. Is negligence a question of law or of fact?

A. The general rule is that the question of negligence should be left to the jury, but where the facts are uncontradicted it is a question of law.—*Williams v RR* 130 NC 116, 40 SE 979.

ACTS CONSTITUTING NEGLIGENCE.

1078. If damage be done by the falling of an object from a building into a street or public highway, is the owner of the property from which the object fell liable in damages for such injury, and if not, why not, and if so, why?

A. He would be if the falling of the object were the result of his own negligence. The owner of a building abutting on or adjacent to a highway owes a duty to the public to exercise reasonable care to prevent injuries to passers-by from its defective or dangerous condition.—29 Cyc 466.

1079. What legal duty is imposed upon the owner of a building as to its safety?

A. So long as the owner of a building violates no duty which he owes to others, he cannot be called in question for the manner in which he uses or manages it.—29 Cyc 465.

1080. If A, by negligence, leaves open the gate of a pasture and B's horse therein gets out and gets kicked or injured by other horses, can the owner recover damages of A?

A. Yes. He is liable for anything that happens as a result of his own act in the ordinary course of things.—*Ins Co v Tweed* 7 Wall (US) 44, 19 L Ed 65.

PROXIMATE CAUSE.

1081. Explain what is meant by proximate cause in its relation to the doctrine of negligence and contributory negligence.

A. Where there is negligence and contributory negligence the liability for damages is on the party whose negligence produced the result in continuous sequence, and without which it would not have occurred.—*Ramsbottom v RR* 138 NC 41, 50 SE 452; *Hudson v RR* 176 NC 488 (492), 97 SE 388.

1082. **For the purpose of determining civil liability, what consequences are deemed immediate and proximate?**

A. Such as would usually be expected to follow from the acts done.—*Bowen v King* 146 NC 385 (391), 59 SE 1044.

1083. **When does negligence become a tort?**

A. Negligence becomes a tort when there is the existence of a duty to plaintiff, failure to perform such duty, and an injury as a result of such failure to perform such duty.—*Mule Co v RR*, 160 NC 215, 76 SE 513.

CONTRIBUTORY NEGLIGENCE.

1084. **What is contributory negligence?**

A. "The want of such care as a prudent man would ordinarily take under similar circumstances, and must in its natural results immediately concur in producing the injury."—*McLamb v RR* 122 NC 862 (874), 29 SE 894.

1085. **What is the basis of the defense of contributory negligence, and what is necessary to prove in order to bar a recovery?**

A. Contributory negligence is based upon the principle that no man shall base a right of recovery upon his own fault.—*Cooley on Torts* 672.

Defendant must show both the commission of a negligent act and the connection of that act with the injury as the proximate cause thereof.—*Brewster v Elizabeth City* 137 NC 392, 49 SE 885; *Lea v Utilities Co* 175 NC 459 (464), 95 SE 894.

1086. **In what cases is contributory negligence not open to a defendant when sued for injuries caused by negligence?**

A. When negligence continues up to the time of the injury, and when the defendant was doing some unlawful thing.—*Orr v Tel Co* 132 NC 691, 44 SE 401; *Hines v Lbr Co* 174 NC 294, 93 SE 833.

1087. **In an action for an injury sustained by a failure to adopt appliances required by law, is contributory negligence a defense?**

A. The failure of defendant to adopt proper appliances bars the defense of contributory negligence, unless such contributory negligence amounted to recklessness.—*Blackburn v Lbr Co* 152 NC 361, 67 SE 915.

1088. **What is the last clear chance rule?**

A. "Where the plaintiff is guilty of contributory negligence the defendant must exercise ordinary care and diligence

to avoid the consequences of the plaintiff's negligence, and if by exercising due care and diligence, the defendant can discover the situation of the plaintiff in time to avoid injury, the defendant is liable if he fails to do so."—Cullifer v RR 168 NC 309, 84 SE 400.

1089. In what class of cases has contributory negligence been abolished in this state?

A. In cases of injury or death to employees by railroads, when such railroad was violating any statute for the safety of employees.—Gregory 1913 Supplement 2645A—Acts 1913 Ch 6.

1090. Under what circumstances, if any, can the plaintiff recover when both negligence and contributory negligence are established?

A. When it can be shown that the defendant had the last clear chance to avoid the injury.—McLamb v RR 122 NC 862 (874), 29 SE 894.

1091. What is concurrent negligence? Is it ever actionable?

A. Where the negligence of both plaintiff and defendant concur and continue to the time of the injury, the negligence of the defendant is not in the legal sense the proximate cause of plaintiff's injury.—Hamilton v Lbr Co 160 NC 47, 75 SE 1087.

Where both parties were negligent, the liability is placed on the one whose negligence was the proximate cause of the injury and, when fixed on one, it is because of his negligence on the part of the other contributing to the injury.—Smith v Norfolk etc RR Co 145 NC 98, 58 SE 799.

1092. What is meant by comparative negligence?

A. "The doctrine of comparative negligence is that plaintiff may recover, although the person injured was guilty of contributory negligence, if that negligence was slight, and the negligence of defendant was gross in comparison."—29 Cyc 559.

ACTIONS.

1093. Where A and B commit a joint assault on C, and afterwards C, for a valuable consideration, releases B, does that also release A? Give the reason for your answer.

A. Releases A. Having been satisfied for the injury by B, C cannot get further satisfaction from A.—Burns v Womble 131 NC 173, 42 SE 573.

1094. **Will the release of one joint tort feisor release the others?**

A. Yes, with some few exceptions.—Burns v Womble, *supra*.

1095. **Is negligence ever presumed, and if so, when?**

A. Strictly speaking, it is not. "While negligence is never presumed, and cannot be inferred from the injury alone, it may be inferred from evidence of the injury in connection with the facts and circumstances under which it occurred."—29 Cyc 590. See also Currie v RR, 156 NC 419, 72 SE 488; Avery v Lbr Co 146 NC 592, 60 SE 646.

1096. **What must plaintiff prove to recover damages for negligence?**

A. Must prove that the negligence was the proximate cause of the injury.—McGeehee v RR 147 NC 142, 60 SE 912.

1097. **Is there any presumption of negligence when the cause of the mischief is apparently under the control of the defendant or his servant?**

A. Yes.—Marcom v RR 126 NC 200, 35 SE 423.

NOVATION

1098. **What is a novation?**

A. The substitution of a new debt or obligation for an existing one.—Black's Law Dict.

NUISANCE

1099. **Define a nuisance.**

A. The term "nuisance" means literally annoyance; anything which works hurt, inconvenience or damage, or which essentially interferes with the enjoyment of life or property.—29 Cyc 1152.

1100. **What is a private nuisance and the remedies?**

A. A private nuisance is an act or omission on the part of one individual or set of individuals that works hurt or injury to another individual or set of individuals, and not to the public at large. They may be abated in some cases, injunctions may be applied for in some cases, and damages may be sued for in all cases.—III Black 220; 10 A & E Enc Law 924.

1101. **May a civil action be maintained for a public nuisance?**

A. Only when plaintiff has sustained some particular damage more than the public at large.—*Reyburn v Sawyer* 128 NC 8, 37 SE 954.

OFFICERS

1102. **Can a person be legally elected a member of the State Legislature—that is, is he eligible—who at the time the election is held, holds any other office or place of trust or profit under the State or Federal Government?**

A. No.—See *Spruill v Bateman* 162 NC 588, 77 SE 768.

1103. **Under the same clause of the constitution, what is the effect of the appointment or election to any office of one who at the time holds an office or place of trust or profit?**

A. Acceptance of the appointment vacates office held at the time.—*In re Martin* 60 NC 153 (Appendix).

If by election is void.—*Spruill v Bateman* 162 NC 588, 77 SE 768.

1104. **What is the difference between offices created by the constitution and those created by the General Assembly and what is the power of the General Assembly with reference to each?**

A. The legislature has power to create any office it may deem necessary, subject to the limitations imposed upon it by the constitution. It has full power and control over all offices of its own creation, as to the act of creating them itself, the qualifications of the incumbents, the manner in which the offices are to be held and conducted, term of office, and salaries, fees, etc., insofar as its power as a legislative body is not limited by the constitution. The legislature has nothing whatever to do with offices created by the constitution, except insofar as the people, by the expression of their will through the constitution, have left to it the control of these offices. In other words, the legislature has full control over offices of their own creation subject to the limitations imposed by the constitution. They have no control over offices created by the constitution except insofar as the constitution has left them to the control of the legislature.—See *Mial v Ellington* 134 NC 131, 46 SE 961.

1105. **What was the purport of the decision in *Hoke v Henderson*, and has it since been overruled? If so, by what case?**

A. *Hoke v Henderson*, 15 NC 1, held that a public office is property, and that the incumbent has the same right in it as he has to any other property, except that he cannot sell or assign it. This case was overruled by *Mial v Ellington* supra.

PARTIES

1106. If **A** sues on a promissory note mistakenly alleging that he is the owner thereof, but before the trial he discovers that **C** is the owner, can **C** be permitted by the Court to become substituted as plaintiff?

A. This matter is within the discretion of the court.—Con Stat 460.

PARTNERSHIP

1107. Distinguish between active, silent, nominal and limited partners.

A. An active partner is one whose name is known to be connected with the firm, and who takes a part in its business matters. A silent partner is one who has money invested in the firm, but whose name does not appear to be connected with it. A nominal partner is one whose name appears in connection with the business as a member of the firm, but who has no real interest in it. A limited partner is one who by complying with the statute becomes liable for the debts of the firm only to a certain extent.—Peebles v Guano Co 77 NC 233; See Straus v Sparrow 148 NC 308, 62 SE 1100.

1108. Can a new member be introduced into a partnership without the consent of all the parties?

A. No.—Smith on Contracts 339.

1109. How is the real estate owned by a partnership regarded in equity? And has the widow of a deceased partner any dower therein?

A. Is regarded as personalty. Widow has no dower therein.—Sprager v Moore 117 NC 449, 23 SE 359.

1110. Can one partner secretly take a renewal of the partnership lease for his own benefit?

A. No. Each partner is agent for other in partnership business.—Powell v Flowers 151 NC 140, 65 SE 817.

1111. Can one partner make a valid sale or mortgage of the partnership effects in payment of, or as security for, a partnership debt, without the knowledge or consent of the other members of the partnership?

A. Yes.—Odom v Clark 146 NC 544 (550), 62 SE 612.

1112. **How should a partner retiring from a firm proceed to relieve himself from further partnership responsibility?**

A. He should give notice of dissolution of firm. This notice should be actual as to parties already dealing with the firm and may be by publication as to others.—*Straus v Sparrow* 148 NC 309, 2 SE 1100.

1113. **Does the personal representative of a deceased partner join a surviving partner in the settlement of the partnership affairs, or is that a matter in the hands of the surviving partner alone?**

A. In the hands of the surviving partner alone.—*Hodgin v Bank* 128 NC 110, 38 SE 294.

1114. **What becomes of the interest of the deceased partner in real estate used by the partnership for purposes of trade or manufacture?**

A. If necessary, it is sold to pay the debts of the partnership. It becomes a part of the assets of the firm, and may be sold as any other property. Widow of the deceased partner will have no dower or other interest in it until all the liabilities of the firm are discharged.—*Sprager v Moore* 117 NC 449, 23 SE 359.

PARTY WALLS

1115. **What is a party wall, and what are the rights thereof to the owners whose land it divides?**

A. A wall built partly on the land of one owner and partly on the land of another for the common benefit of both.—*Black's Law Dict.*

“The effect of a party wall agreement is to create cross-easements as to each owner, binding all persons succeeding to the estates to which the easements are appurtenant.”—*Ried v King* 158 NC 85, 73 SE 168.

PATENTS

1116. **Is a patent right assignable, and is it subject to sale under execution?**

A. Yes, it is assignable, but is not subject to levy under execution.—*Ager v Murray* 105 US 126, 26 Law Ed 942.

1117. Distinguish between "patent," "copyright," and "trademark."

A. Patent is the exclusive right of an inventor to make and sell his invention. Copyright is an exclusive right of property in a literary production. Trademark is a distinctive mark affixed by a manufacturer to his goods so that they may be identified in the market.—Black's Law Dict.

PAYMENT

1118. What is the general rule governing the appropriation of payments?

A. The person making the payment has the right to apply it to any debt that he sees fit. If he fails to specify to which debt the payment is to be applied, the creditor may make such application as he sees fit, and if he fails to make such stipulation, the law will decide.—Raymond v Newman 122 NC 52, 29 SE 353.

PLEADINGS

COMPLAINT, 1132.

ANSWER, 1137.

REPLY, 1148.

DEMURRER, 1150.

SIGNATURE AND VERIFICATION, 1153.

ISSUES, PROOF AND VARIANCE, 1155.

1119. What is meant by the pleadings in an action, of what do they consist, and what do they contain?

A. The statement in a legal and logical form of the plaintiff's cause of action and the defendant's ground of defense.

They consist of the complaint, the answer or demurrer, and reply.

1120. What are the chief objects of pleadings?

A. To produce an issue.—Stephens on Pleadings 148.

1121. What is the purpose and effect in pleading of:

Complaint?—A. To set forth the plaintiff's cause of action.

Demurrer?—A. To take advantage of defects on the face of the complaint.

Answer?—A. To set forth new matter in defense of the defendant.

Reply?—A. To deny a counterclaim.

1122. How must pleadings be construed under the Code?

A. In the construction of a pleading for the purpose of determining its effect, its allegations shall be liberally construed with a view to substantial justice between the parties.—Con Stat 535.

1123. By what pleadings are the parties brought to an issue of law?

A. By complaint and demurrer.—Con Stat 581.

1124. What are the six classes of principles or primary rules under which the rules of pleadings are treated in Ewell's Essentials of Law? (Common Law.)

- A. 1. Rules which tend to produce an issue.
2. Rules which tend to materiality of issue.
3. Rules which tend to simpleness of issue.
4. Rules which tend to certainty of issue.
5. Rules which tend to prevent obscurity of issue.
6. Rules which tend to prevent prolixity of issue.
7. Miscellaneous rules.—Stephen on Pleading 155.

1125. In respect to the old courts are the code pleadings more like the common law pleadings or the equity pleadings?

A. More like the equity pleadings.

1126. What are the general and orderly parts of a suit?

- A. 1. Summons.
2. Complaint.
3. Answer, demurrer or reply.
4. Trial.
5. Judgment, sometimes appeal.
6. Execution.

At common law :

1. Original writ.
2. Process.
3. Pleadings, which are :
 - a Declaration plaintiff
 - b Plea defendant
 - c Replication plaintiff
 - d Rejoinder defendant
 - e Surrejoinder plaintiff
 - f Rebutter defendant
 - g Surrebutter plaintiff
4. Issues.
5. Trial.
6. Judgment.
7. Processes in nature of appeal.
8. Execution.—III Black 272.

1127. What is the regular procedure for the enforcement of a right by civil action?

A. Suit is begun by issuing summons, which is served by sheriff or other officer. Complaint is filed. This is followed by answer or demurrer, thus producing an issue between the parties. Next in order is trial, then judgment, which is followed by execution.

1128. A is the payee on a note for \$500 executed by B, and B is the payee on a note executed by A for \$1,000. The execution of each note is admitted, but each maker claims that he has paid the note that he executed. A brings action against B. Give the successive steps in the action, and when they are to be performed up to and including final judgment in the Superior Court. The purpose of this question is to see if you know what processes should be issued, and when, what pleading should be filed, and when, and how the case is tried.

A. A should have summons issued against B, returnable before the clerk not less than ten nor more than twenty days from date of issuance. Complaint should be filed on or before return day of summons. B should file answer within twenty days from return day of summons, denying that he owes note and set up counterclaim. A should reply and deny that he owes note to B. Case stands for trial at succeeding term before jury, and judgment is in accordance with verdict.

1129. What is a repleader?

A. When, after issue has been joined in an action and for a verdict given thereon the pleadings is found (upon examination) to have miscarried and failed to effect its proper object, viz., of raising an apt and material question between the parties, the court will, on motion of the unsuccessful party, reward a repleader; that is, will order the parties to plead *de novo* for the purpose of obtaining a better issue.

1130. What is the object of pleading?

A. To produce an issue.

1131. By what pleadings are the parties brought to an issue of fact?

A. An issue of fact arises:

1. Upon a material allegation in the complaint controverted by the answer.
2. Upon new matter in the answer, controverted by the reply.
3. Upon new matter in the reply.

COMPLAINT.

1132. Before the Code, what was the first pleading in an action called, and what is it called now? What is the difference between them?

A. Declaration, now called complaint. The declaration should recite the original writ, set out the plaintiff's ground of action and tender issue. The complaint is merely used to set out the plaintiff's ground of action and tender issue. They differ in form, but the same purpose is served by both.

1133. Draw a verified complaint in which the plaintiff is the holder of a promissory note.

In the Superior Court.

North Carolina,
Wake County.

Richard Roe	}	COMPLAINT.
v.		
John Doe		

The plaintiff above named, complaining of the defendant, alleges:

1. That Richard Fen executed and delivered to the defendant, John Doe, a promissory note in words and figures as follows:

“\$500.00

Raleigh, N. C., Jan. 1, 1920.

“Twelve months after date, for value received, I promise to pay to John Doe, or order, FIVE HUNDRED (\$500.00) DOLLARS, with interest from date at 6 per cent. per annum.

(Signed)

“RICHARD FEN (Seal).”

2. That on or about the first day of February, 1920, defendant endorsed the said note as follows: “Pay to the order of Richard Roe. (Signed) John Doe,” thereby becoming surety for the payment of the same; after said endorsement, said note was duly delivered to plaintiff for value in due course.

3. That said note at maturity was presented to the maker for payment, and payment was refused, and due notice of said dishonor was given to John Doe, the endorser.

4. Payment of said note has been demanded of the defendant but nothing has been paid thereon, and there is still due and unpaid the sum of FIVE HUNDRED DOLLARS with interest from the first day of January, 1920.

WHEREFORE, the plaintiff prays judgment:

For five hundred dollars with interest from January first, 1920.

For the costs of this action.

For such other and further relief as he may be entitled to in the premises.

.....
Attorney for Plaintiff.

North Carolina, Wake County.

Richard Roe, the plaintiff above named, being duly sworn, says: That the foregoing complaint is true of his own knowledge, except as to matters therein stated on information and belief, and as to these, he believes it to be true.

(Signed)

RICHARD ROE.

Sworn to and subscribed before me, this 15th day of February, 1921.

.....
Clerk Superior Court.

1134. What causes of action may be united in the same complaint?

- A. 1. Same transaction; or transaction connected with the same subject of action.
2. Contract, express or implied.
3. Injuries with or without force to person and property or to either.
4. Injuries to character.
5. Claims to recover real property with or without damages for the withholding thereof, and the rents and profits of the same.
6. Claims to recover personal property, with or without damages for the withholding thereof.
7. Claims against a trustee by virtue of a contract or by operation of law.—Con Stat 707.

1135. What must the complaint contain?

- A. 1. The title of the cause, specifying the name of the court in which the action is brought, the name of the county in which the trial is required to be had, and the names of the parties to the action, plaintiff and defendant.
2. A plain and concise statement of the facts constituting a cause of action, without unnecessary repetition; and each material allegation must be distinctly numbered.

3. A demand for the relief to which the plaintiff supposes himself entitled. If the recovery of money is demanded, the amount must be stated.
4. In actions for the recovery of a debt contracted for the purchase of land, a statement that the consideration of the debt was the purchase money of certain land, describing the land in an intelligible manner, such as the location, boundaries, and acreage.—Con Stat 506.

1136. Is there any restriction on the right to amend a complaint and if so, what is it?

A. Courts have no power to permit amendments, when an amendment proposed to be made will evade or defeat the provisions of a statute.—Cogdell v Exum 69 NC 464.

ANSWER.

1137. What must the answer contain?

- A. 1. A general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof, sufficient to form a belief.
2. A statement of any new matter constituting a defense or counterclaim, in ordinary and concise language, without repetition.—Con Stat 519.

1138. When must an answer be filed?

A. Within twenty days after return day of summons.—Con Stat 509.

1139. Can you answer and demur at the same time to the same cause of action? What is the essential difference between them?

A. Cannot answer and demur both.—Ransom v McClees 64 NC 17.

“A demurrer is an objection that the pleading against which it is directed is insufficient in law to support the action or defense, and that the demurrant should not, therefore, be required to further plead.”—Wood v Kincaid 144 NC 393, 57 SE 4.

An answer is for the purpose of either denying the allegations of the complaint or setting up new matter in defense of the facts alleged in the complaint.—Con Stat 519.

1140. The defendant admits the execution of the note as set out in Question 1133, and claims that he has paid the note in full. Draw the answer.

In the Superior Court.

North Carolina,
Wake County.

Richard Roe
v. ANSWER.
John Doe

The defendant, answering the complaint of the plaintiff, says:

1. That the allegations contained in paragraph one of the complaint are admitted to be true.

2. That the allegations contained in paragraph two of the complaint are admitted to be true.

3. That the allegations contained in paragraph three of the complaint are untrue, and are denied, the defendant having paid the said note in full.

4. That the allegations contained in paragraph four of the complaint are untrue and are denied, the defendant having paid the note in full.

Wherefore, the defendant prays the court that he go hence without day, and for the costs of this action to be taxed by the clerk.

.....

Attorney for Defendant.

North Carolina, Wake County.

John Doe, the defendant above named, being duly sworn, says: That the foregoing answer is true of his own knowledge, except as to matters therein stated on information and belief, and as to these, he believes it to be true.

(Signed)

JOHN DOE.

Sworn to and subscribed before me, this 20th day of February, 1921.

.....

Clerk of Superior Court.

1141. If the answer set forth a counterclaim, and the plaintiff failed to reply or demur thereto, may the defendant move for judgment upon such statement?

A. Yes.—Con Stat 597.

1142. What is the difference between a plea in bar and one in confession and avoidance?

A. Pleas in bar deny the allegations of the declaration. Pleas in confession and avoidance admit the allegations of the declaration, but set up some new matter of defense by which to evade it.—III Black 303, 305.

1143. Give an example of a plea in confession and avoidance.

A. A sues B on a note for \$500. B admits the execution of the note, but alleges that the note was accommodation paper made for the benefit of A.

1144. How are pleas in bar divided?

A. General: Traverse, or general issue.
Confession and avoidance.

Special: Justification.

Estoppel.

Statute of limitations.—Stephens on Pleadings 89; III Black 303, 305.

1145. What is meant by the plea puis darien continuance?

A. It is a plea allowed to set up some new matter in defense that has arisen since the last continuance of the action.—Stephens on Pleadings 97.

1146. What is known in pleading as the “general issue” and what as being in “confession and avoidance?”

A. General issue is pleaded to denote general denial of the allegations of the plaintiff. Confession and avoidance was used in cases where the defendant admitted what was alleged in the declaration, but set up some other matter by way of defense.

1147. Upon whom is the burden of proof in each case?

A. When general issue is pleaded, the burden is on the plaintiff. In confession and avoidance it is on the defendant.

REPLY.

1148. Is a reply to the answer in Question 1140 necessary? Give reason.

A. No reply is necessary for no new matter is set out by way of counterclaim.—Con Stat 525.

1149. When should a reply be filed?

A. When the answer contains new matter constituting a counterclaim, the plaintiff may reply to such new matter denying generally or specifically each allegation.—Con Stat 525.

DEMURRER.**1150. What is a demurrer and how many kinds are there? What is a speaking demurrer?**

A. A demurrer is the formal mode of disputing the sufficiency in law of the pleadings of the other side. They are usually classified as general or special.

A general demurrer is a demurrer framed in general terms, without showing specifically the value of the objection, and is usually resorted to when the objection is to matter of substance.

A specific demurrer is one which excepts to the sufficiency of the pleadings on the opposite side and shows specifically the nature of the objection, and the particular ground of the exceptions.

A speaking demurrer is one which, in order to sustain itself, requires the aid of a fact not appearing on the face of the pleading objected to, or in other words, which assures the existence of a fact not already pleaded, and which constitutes the ground of objection.—Black's Law Dict.

Speaking demurrer not allowable in this state.—Wood v Kineaid 144 NC 393, 57 SE 4.

1151. When may the defendant demur?

A. When it appears from the face of the complaint:

1. That the court has no jurisdiction of the person of the defendant or of the subject of the action.
2. That the plaintiff has not legal capacity to sue.
3. That there is another action pending between the same parties for the same cause.
4. That there is a defect of parties plaintiff or defendant.
5. That several causes of action have been improperly united.
6. That the complaint does not state facts sufficient to constitute a cause of action.—Con Stat 511.

1152. What defects or objections are not waived by failing to demur?

A. Those to jurisdiction, and those that complaint does not state facts sufficient to constitute a cause of action.—Con Stat 518.

SIGNATURE AND VERIFICATION.

1153. When must a pleading be verified, and how?

A. When one pleading is verified, all subsequent ones except demurrer must be. It is done by oath of one of the parties to the effect that pleading is true to his own knowledge, except as to matters stated on information and belief, and as to these, he believes it to be true.—Con Stat 528, 529.

1154. Is it necessary that pleadings should either be subscribed or verified?

A. They must be subscribed, and when a pleading is verified, all subsequent pleadings, except demurrer, must be verified.—Con Stat 528.

ISSUES, PROOF, AND VARIANCE.

1155. What are issues? How many kinds are there, and how are they tried?

A. The disputed point or question to which the parties in an action have narrowed their several allegations, and upon which they are desirous of obtaining the decision of a proper tribunal.—Black's Law Dict.

There are issues of law and issues of fact. Issues of law are decided by the judge; issues of fact by the jury.—Lockhart's Evidence Sec 8.

1156. By whom are the issues of fact to be made up?

A. The issues arising upon the pleadings material to be tried shall be made up by the attorneys appearing in the action, and reduced to writing, or by the judge presiding, before or during the trial.—Con Stat 584.

1157. How does an issue of law arise?

A. Issues of law arise on demurrer.—Con Stat 581.

1158. What is meant by a variance, and when does it occur?

A. This means a disagreement between the allegations in the pleadings and the evidence.—Stephens on Pleadings 118.

1159. When is a variance between allegations and proof material? What should the judge do if the case is material, and what if the case is not material?

A. It is material only when it leads the adverse party to his prejudice. The judge should order the pleadings to be amended on such terms as may be just. Where not material, the judge may direct the fact to be proved according to the evidence.—Con Stat 552.

PLEDGES

1160. What is essential to constitute a pledge of personal property as security for a debt?

A. Delivery of property to creditor as such security, thereby conveying to pledgee a special property in the thing pledged.—Bispham's Equity Sec 359.

1161. What is the difference between a pledge and a mortgage?

A. Pledge applies only to personal property and consists in the delivering the property to pledgee to hold until the debt be paid, the possession being in the pledgee, the title in the pledgor. In a mortgage the legal title is conveyed to the mortgagee to secure the debt, the possession usually being left in the mortgagor.—Bispham's Equity Sec 359; *McCoy v Lassiter* 95 NC 88.

1162. In the absence of an express agreement to that effect, can the pledgee become the purchaser of the pledged property at his own sale? Why?

A. He could, but such sale would be voidable at the option of pledgor. "There is no question according to our authorities, that if a mortgagee with power to sell indirectly purchases at his own sale, the mortgagor may elect to avoid the sale, and this without reference to its having been fairly made, and for a reasonable price. This is an inflexible rule, and it is not because there is, but because there may be, fraud."—*Rich v Morrissey* 149 NC 37, 62 SE 762.

POWERS

1163. What is a power?

A. An authority by which one person enables another to do some act for him.—Black's Law Dict.

1164. What is meant by a power in real estate law, and what are the various kinds of powers?

A. A method of causing a use with its accompanying estate to spring up at the will of a given person. (Compare shifting and springing uses, Question 1347.)

Classification:

1. Collateral or
2. Not collateral.

1. Powers appendant or
2. Powers in gross.
1. General or
2. Special.—II Wharton Real Property 634 et seq; See also Dunn v Keeling 13 NC 283.

1165. What is meant by a power coupled with an interest? Give an illustration, and state whether such power is revocable.

A. By a power coupled with an interest is meant the right or power to do some act, together with an interest in the subject matter on which the power is to be exercised, as in case of power of sale in a mortgage. Such power is not revocable.—Black's Law Diet; Carter v Slocum 122 NC 475, 29 SE 720.

1166. If A mortgages land to B with power of sale to secure a debt, and B afterwards assigns the debt, can the latter execute the power in his own name?

A. No. "An assignment which does not in terms profess to act upon the land, the subject matter of the deed or mortgage, nor upon the estate or interest which the assignor may have therein, but only upon the mortgage itself, is not sufficient to pass the land, or the legal title thereto; and the power of sale which is only an incident, does not, therefore, pass."—Weil v Davis 168 NC 298, 84 SE 395; Williams v Teachy 85 NC 402.

Note: It will be seen from the above that where there is only an assignment of the mortgage itself, that the assignee cannot execute the power in his own name. In order for him to execute the power, there must be a conveyance by the mortgagee of his interest in the land, the subject of the mortgage, which he has by virtue of such mortgage. Where there is only an assignment of the mortgage itself, the legal title, with the power of sale, remains in the mortgagee, but if mortgagee conveys his interest in the land itself, the legal title vests in the grantee of the mortgagee.

PRINCIPAL AND AGENT

THE RELATION, 1170.

MUTUAL RIGHTS, DUTIES AND LIABILITIES, 1176.

RIGHTS AND LIABILITIES AS TO THIRD PERSONS, 1180.

1167. Define agency, and how is the relation created?

A. Agency is the relation between two persons by which one, the agent, is authorized to bring the other, the principal, into contractual relation with third persons. The relation is created by agreement, by ratification, by estoppel, and by necessity.—Huffcut on Agency Sec 9.

1168. What is the difference between a general and a special agent, and what is the most important distinction to be made between the contracts of a general and those of a special agent?

A. A general agent is one having the authority to represent his principal in any matter connected with the agency. In special agency he is authorized to represent his principal only in some specified thing. The contracts of a general agent bind the principal if within the apparent scope of his authority while those of a special agent only bind when within the actual scope of his authority.—*Lane v Dudley* 6 NC 119.

1169. What is the difference between a servant and a contractor and an agent?

A. A servant acts in behalf of his master and under his authority and discretion. An agent is one who acts in the place of his principal and may bind his principal upon a contract with a third party, which neither a servant nor a contractor can do. A contractor neither acts under the direction of anyone, nor is he given the power to bind anyone with whom he contracts upon an agreement with a third party, but is one who undertakes for a given consideration to do some particular act or acts.

THE RELATION.

1170. How may implied authority of an agent arise?

A. From implications, from the nature of the business to be done and from the general usage of trade and commerce.—*Huntley v Mathias* 90 NC 101.

1171. Can a principal revoke the authority of his agent at any time and in all cases?

A. Yes, except when agent has interest in subject matter of the agency.—*Abbott v Hunt* 129 NC 403; 40 SE 119.

1172. What is the difference between an attorney-in-fact and an attorney-at-law?

A. An attorney-in-fact may be any person acting under a power or commission. An attorney-at-law is one who has license from the state to represent others in matters in court.—*Supply Co v Machin* 150 NC 738 (744); 64 SE 887.

1173. Can a person be agent for both parties to a transaction, and, if so, under what circumstances?

A. Yes, when their interests are not antagonistic.—146 NC 397, 59 SE 1000.

1174. What general rule of law is laid down in the books and decided cases under which a real estate agent is entitled to his commission?

A. The vendor has the right to prescribe the terms of sale and is not liable for commissions unless these terms of sale are complied with; on the other hand, the agent cannot be deprived of compensation because of failure of the vendor to convey if he find a purchaser who notified the vendor of his readiness and ability to comply with the terms of sale imposed by the vendor.—Clark v East Lake Lbr Co 158 NC 139; 73 SE 793.

1175. A negotiates a sale of land from B to C under an agreement that he is to receive 5 per cent. commission from B and the same amount from C, the agreement for commissions being made separately and without B or C knowing of the agreement with each other. There is no false representations made and the purchase price is fair. Can A recover his commissions from B or C or both? Give reason.

A. "If a broker merely brings together the parties to an exchange or purchase and sale of property, and his employment then terminates, and the parties themselves settle the terms of the transaction, he acts as a mere middleman, and he may accordingly recover a commission from each party if each has agreed to pay him. If, however, the broker is employed as the agent of either party, so that that party relies on him to secure the best bargain possible, then the general rule forbidding a secret double employment applies, and the broker cannot recover commissions from both parties to the transaction, unless they consent to his acting for both either expressly or by implication from the circumstances of the case."—19 Cyc 234.

MUTUAL RIGHTS, DUTIES AND LIABILITIES.

1176. Has an agent the power to employ a sub-agent, and if so, under what circumstances?

A. Such authority is sometimes implied from the conduct of the parties, and the nature of the business, the usages of the trade or an unforeseen emergency.—Clark on Contracts 511.

1177. Would a person who deals with an agent and who knows that the authority of the agent is in writing, be bound by its terms whether he examined it or not?

A. Yes.—Bank v Hay 143 NC 326; 53 SE 811.

1178. Is a del credere agent liable to his principal as guarantor or as original debtor, and is his contract within the statute of frauds?

A. He is liable as original debtor, and his contract is within the statute of frauds.—Clark on Contracts 516.

1179. If an agent makes a contract in his own name, instead of using the name of his principal, what are the latter's rights and liabilities in respect to it?

A. Where the agent possesses due authority to make a written contract, not under seal, and he makes it in his own name, whether he describes himself to be an agent or not, or whether the principal is known or unknown, his principal will be entitled to sue thereon, in all cases, unless from attendant circumstances it is clearly manifested that an exclusive credit is given to the agent and it is intended by both parties that no resort shall in any event be had by the principal upon it.—Brown v Morris 83 NC 251.

RIGHTS AND LIABILITIES AS TO THIRD PERSONS.

1180. Does the agent's power to sell imply power to warrant the titles?

A. Yes.—Mills Co v Engine Co 116 NC 797 (802); 21 SE 917.

1181. Would an unknown principal when discovered be bound on a contract which his agent had made for him?

A. Yes.—Brown v Morris 83 NC 251, Nicholson v Dover 145 NC 18; 58 SE 444.

1182. How far generally is the principal liable for the acts of his agent?

- A. 1. When the agent acts within the scope of his actual authority.
2. When the contract, though unauthorized, has been ratified.
3. When the agent acts within the scope of his apparent authority.—Banks v Hay 143 NC 326; 53 SE 811.

1183. What is necessary to show ratification of an act of an agent done without authority?

A. "In order to effect a ratification, the following conditions must exist:

"a. The person ratifying must have the present ability to do the act himself or to authorize it to be done.

"b. The person for whom the act was done must have been identified or capable of being identified; in other

words, the person who did the act must have acted for the particular person ratifying or, if he did not know who the particular person was, then for persons of his description.

“c. The act must have been done by the person acting **as** agent and not on his own account. That is, the person who did the act must at the time not only have **intended** to act on behalf of the person ratifying, but it seems also to be necessary that he should then have **professed** to act for a principal, though it is not necessary that he should have disclosed who the principal was.

“d. The person ratifying must have been in existence at the time the act was done.

“e. The person alleged to have ratified must, at the time of the alleged ratification, have either had full knowledge of all of the material facts relating to the act ratified or he must have deliberately assumed responsibility for the act, having all the knowledge of the facts which he cared to have. Knowledge of the material facts is essential, but knowledge of the legal effect of those facts is not essential.

“f. The principal cannot ratify the act so far as it is favorable to him, and reject it as to the residue; but he must ratify all or none. If he takes the benefits he must also assume the burdens. But where the principal has authorized the doing of a certain act, he does not by accepting the benefits of that act assume responsibility for an additional unauthorized act of whose performance he was ignorant.

“g. The facts alleged to show the ratification must be such, and there must be such reliance upon them, that the party relying upon them will be prejudiced if the ratification is not established.

“h. The ratification can not be made to so operate as to cut off the intervening rights of third persons who have acted in good faith and without notice of the acts sought to be ratified.

“i. The party alleging that ratification has taken place must establish it by a preponderance of the evidence.”—Meehem’s Outlines of Agency 48 et seq.

1184. **An agent for the sale of goods makes a material and false representation as to them, which he believes to be true, but which his principal knew to be false, and which was hon-**

estly intended by the agent to induce, and which did induce another to buy from him. Is the sale a valid one, and can the purchaser repudiate it? Give the reason.

A. Can be repudiated by purchaser, but not by principal. Principal was, but purchaser was not, aware of the agreement into which he was entering, principal being responsible for the purchaser's making the contract.—*Peebles v Guano Co* 77 NC 233.

1185. Where an agent contracts in his own name, can his principal enforce the contract? If so, can the defendant set up by way of counterclaim or set-off any claim he has against the agent?

A. Principal can enforce contract subject to counter-claims of defendant against agent.—*Watson v Proximity Mfg Co* 147 NC 469, 61 SE 273.

1186. Is the principal who sells land through an agent responsible in damages for false representation made by agent by which the purchaser was induced to buy although the principal had no knowledge of such representation?

A. Yes.—19 Cyc 300.

PRINCIPAL AND SURETY

1187. What is the difference between the liability of a surety, endorser and guarantor?

A. Surety is maker of a note and secondarily liable for its payment.

"An endorsee is held to strict punctuality in presenting the note for payment to the endorser, on failure of payment by the maker. It is the duty of the holder of a guaranty ordinarily to make a demand of the maker, but if he be insolvent it is unnecessary, and the failure to do so will not discharge the guarantor, for he must show that by a guarantee's negligence he has sustained a loss, and herein a guaranty differs from an endorsement."—*Sullivan v Field* 118 NC 358 (360), 24 SE 735; *Andrews v Pope* 126 NC 472, 35 SE 817.

1188. What is the remedy of a surety against his principle after the debt has become due before it is paid?

A. "It is settled that no action can be maintained by the surety upon an implied promise, if the principal has made default, without first making payment of the debt, except where the principal has broken his promise to do or refrain from doing some particular act or thing or to save the surety from some charge or liability. Thus, where the maker of a note

agrees with the surety to pay the amount of the note to the payee on a given day but makes default, the surety can recover from his principal without first making payment of the note."—Hilliard v Newberry 153 NC 104 (107), 68 SE 1056.

1189. **A, B, and C are sureties on a note for \$1,000 and A is compelled to pay the note. B is insolvent. What are the rights of A against C? What is the doctrine called?**

A. A is put in the place of C's creditor. The doctrine is called subrogation.—Williams v Washington 16 NC 137; Carriago Co v Dowd 155 NC 307, 71 SE 721.

1190. **Six months after date we promise to pay to the order of C one hundred dollars. Witness our hands and seals.**

A (Seal).

B (Seal).

Will B be permitted to prove as against C that he is a surety? If so, under what circumstances?

A. Yes, if C knew that he was a surety.—Williams v Lewis 158 NC 571, 74 SE 71.

1191. **Can one who is apparently a principal be shown by parol to be a surety, and if so, under what circumstances?**

A. Yes, if suretyship was known to payee.—Bank v Swink 129 NC 255, 39 SE 962.

1192. **Is a surety ever bound when the principal is not? If so, for what reasons and how illustrated?**

A. Yes, when principal is not competent to contract, as in case of a surety when the principal is a minor, or when the principal is discharged in bankruptcy.—Daniel on Neg Inst 1306a.

1193. **Is it necessary to give notice to the surety, endorser, or guarantor of the principal's default, or to take any other steps in order to charge him?**

A. It is necessary to give notice promptly to endorser of dishonor or he is released. No notice is necessary in guaranty unless guarantor can show that he has sustained a loss by failure to give notice. Notice is not necessary to surety.—Con Stat 3071. Endorsers of non-negotiable paper are not entitled to notice.—Johnson v Lassiter 155 NC 47, 71 SE 23.

1194. **Will an agreement for an extension of time to the principal in a note founded upon a usurious consideration discharge the surety?**

A. No.—Fleming v Borden 126 NC 450, 36 SE 17; Bank v Lineberger 83 NC 454.

1195. **How is a surety who is fully indemnified affected by any extension of time given to the principal?**

A. He is not released.—Bank v Lineberger 83 NC 454.

PROCESS

1196. **By what original process is a civil action and a special proceeding commenced in the courts of this state?**

A. Summons.—Con Stat 475.

1197. **What does the summons in an action contain?**

A. It should run in the name of the state and be directed to the sheriff of the county in which defendant lives, commanding him to summon the defendant to appear at the time therein stated and answer or demur to the complaint of the plaintiff. It should also contain notice to the defendant that if he fails to appear and answer or demur, that the plaintiff will apply to the court for the relief demanded. If it is issued to a county other than that in which the clerk lives who issued it, it should have the clerk's official seal attached.—Con Stat 476.

1198. **Before the Code of Civil Procedure, how were actions at law commenced?**

A. By original writ.

1199. **Since the adoption of the Code, how are they commenced?**

A. By summons.

1200. **What is the difference between a summons and a subpoena?**

A. A summons is issued to bring a defendant into court to answer to a complaint. A subpoena is issued to bring a witness into court to testify.

1201. **To what term of court is a summons returnable with regard to date of issue?**

A. Under the present law, it is returnable before the clerk not less than ten nor more than twenty days from issuance.—Con Stat 476.

1202. **How do you serve a summons on a corporation? On an infant?**

A. By leaving a copy with an agent or officer of the corporation. If infant is under fourteen years of age, by leaving a copy with him and his father, mother, guardian or person with whom he resides.—Con Stat 483.

1203. What constitutes proof of service of summons?

A. When served by a sheriff his certificate or summons to that effect. When served by publication the affidavit of a foreman, editor, proprietor, or other officer of the newspaper in which published. When service is accepted, signature of defendant is sufficient.—Con Stat 489.

PROHIBITION

1204. What is a writ of prohibition? And from what courts does it issue?

A. It is a writ restraining the action of a lower court proceeding outside of its powers, and is issued from Supreme Court only.—RR v Newton, 133 NC 136, 45 SE 549.

RAILROADS

1205. By what methods may a railroad company be incorporated to construct and operate under one management a railroad through several states?

A. In the states a railroad company can be created a corporation either by special act of legislature, where such is allowed or by charter under the general corporation laws; in the territories only by act of Congress.

Charters couched in the same language conferring similar franchises have been granted by different states and under these one organization has been effected, and thus the railroads do interstate business. Also a state by an enabling act has authorized a corporation organized in another state to operate a railroad within its limits. And likewise a railroad corporation organized in one state may, by conforming to the laws of another state, be authorized to do business within such other state.—10 Cyc 170.

1206. Upon what ground does the state exercise the right to regulate the freight and passenger rates of a railroad?

A. The power of the general assembly to establish a commission to supervise and regulate the rates and operations exercising public franchises has too often been decided in the State and Federal Supreme Courts to be again discussed.—Corporation Comm v RR 137 NC 1, 49 SE 191.

1207. Suppose A executes a deed to a railroad corporation in fee simple, does that confer any greater rights than the corporation could have acquired by condemnation?

A. Yes, under fee simple deed, the railroad would hold the land just as an individual in fee, but under condemnation pro-

ceeding, the estate which the railroad would acquire would amount to only an easement.—RR v Sturgeon 120 NC 225, 27 SE 1007.

1208. In North Carolina are railroad companies responsible or not to a servant for injuries caused by the negligence of a fellow servant?

A. They are. under the Federal Employers' Liability Act and under the North Carolina statute.—Con Stat 3465; Coley v RR 129 NC 407, 40 SE 195.

1209. A, while intoxicated, falls asleep on the track of the Southbound Railroad Company and is struck by a passing train and injured. The engineer could have seen A in time to avoid the accident, but he did not see him. Is the railway company liable? If so, upon what principle?

A. "Notwithstanding the previous negligence of the plaintiff, if, at the time when the injury was committed it might have been avoided by the exercise of reasonable care and prudence on the part of the defendant an action will lie for damages."—Deans v RR 107 NC 686, 12 SE 77.

This is upon the principle that defendant had the last clear chance to save plaintiff.—McManus v RR 174 NC 735, 94 SE 455.

1210. Suppose cattle are killed on a railroad track by a moving train; what is the rule of evidence as to presumption and burden of proof of negligence?

A. "When any cattle or other livestock shall be killed or injured by the engine or cars running upon any railroad, it shall be prima facie evidence of negligence on the part of the company; provided, that no person shall be allowed the benefit of this section unless he shall bring his action within six months after his cause of action shall have accrued."—Con Stat 3482.

The burden is on the defendant to rebut this presumption.—Davis v RR 134 NC 300, 46 SE 115.

1211. If a railroad train kills horses running loose on the track, what is the law in such cases as to the proof of negligence?

A. Negligence is presumed if action is brought within six months.—Con Stat 3482.

RECEIVERS

1212. **When may a receiver be properly asked for?**

- A. "1. Before judgment, on the application of either party, when he establishes an apparent right to property which is the subject of the action and in the possession of an adverse party, and the property or its rents and profits are in danger of being lost, or materially injured or impaired; except in cases where judgment upon failure to answer may be had on application to the court.
2. After judgment, to carry the judgment into effect.
3. After judgment, to dispose of the property according to the judgment, or to preserve it during the pendency of an appeal, or when an execution has been returned unsatisfied, and the judgment debtor refuses to apply his property in satisfaction of the judgment.
4. In cases provided in chapter entitled Corporations in the article Receivers; and in like cases of the property within this state of foreign corporation."—Con Stat 860.

REFERENCE

1213. **What are the different kinds of references to a referee to try a cause? State the difference in the effect.**

A. By consent and compulsory:

Consent reference is a waiver of a jury trial.

Compulsory reference, properly excepted to, is not a waiver of a jury trial.—Con Stat 572, 573, 579.

1214. **Are the findings of fact by a referee binding on the judge of the Superior Court? What is necessary when a compulsory reference is had, in order that a party may have a trial by jury?**

A. No.—Henderson v McLain 146 NC 329, 59 SE 873.

In order for a party to reserve his right to a trial by a jury in case of a compulsory reference, he must object to the order of reference at the time it was made, present such issues as he deems necessary to present the controverted facts; except to the report of the referee, and demand a jury trial at each stage thereon; point out the issues upon which his exceptions are taken and demand a trial by jury thereon.—Driller Co v Worth 117 NC 515, 23 SE 427; Ogden v Land Co 146 NC 443, 39 SE 1027.

REFORMATION OF INSTRUMENTS

1215. What is the equitable remedy of reformation?

A. It is the power of a court to correct and reform an instrument that has been executed by mutual mistake of fact or because of fraud.—Bispham's Equity Sec 468.

1216. In what cases will equity reform a written instrument?

A. Equity will reform a written instrument in cases of fraud and mistake.—Bispham's Equity Sec 468.

1217. Will equity relieve against mistakes of fact or mistakes of law, or both?

A. Mutual mistakes of fact only, as a general rule, but if there is any element of misrepresentation relief will be given in cases of mistakes of law.—Bispham's Equity Sec 23.

1218. Will equity relieve against the mistakes of one party only to an instrument?

A. If the mistake was induced or fraudulently taken advantage of by the other party, equity will relieve, but this is more properly on the ground of fraud.—Bispham's Equity Sec 191.

1219. When does equity obtain jurisdiction to grant relief where bonds or other instruments are lost, and why?

A. At common law, proof, or production in court of the bond or other instrument sued upon, was necessary. If it was lost, the remedy was lost, at common law, and equity alone could enforce the re-execution of the instrument, and it thereby acquired jurisdiction of the matter.—Adams Equity 167.

1220. Under what heads do bills for reformation of written instruments fall, and what degree of proof is required for the successful maintenance of such a suit?

A. Equitable remedies. Proof must be clear, strong and convincing.—Lehew v Hewitt 138 NC 6, 50 SE 459; Bispham's Equity Sec 468.

1221. What are the necessary allegations and proofs to support an action for relief against a mistake of fact?

A. Mutual mistakes of fact must be alleged, and the proof must be clear, cogent and convincing.—King v Hobbs 139 NC 170, 51 SE 911.

1222. What is the rule in equity as to granting relief in cases of mistake in a will, and is evidence dehors the will to show mistake admissible?

A. Equity corrects mistakes in wills only when the mistake is apparent on the face of the will, or made out of due construction of its terms.—Bispham's Equity Sec 196.

1223. Will a court of equity entertain jurisdiction to set aside a will or any part thereof, and if so, under what circumstances?

A. Not properly speaking. If a mistake is apparent on the face of the will, equity will correct.—Bispham's Equity Sec 196.

1224. Will equity reform a policy of insurance? Give the reason applicable.

A. Yes, in case of mistake or fraud. The reason is that the intentions of the parties are not set forth in the policy.—Sykes v Ins Co 148 NC 13 (20), 61 SE 610.

1225. Will equity grant relief to the obligee in a bond who has himself destroyed the instrument?

A. Not if destroyed intentionally. Would if destroyed unintentionally.—Adam's Equity 166.

1226. A offers to sell B a tract of land for \$1,000 by a description which covers two tracts. A intends to sell one tract only, and believes that the description covers his intent. B accepts his offer in good faith in ignorance of A's mistake. What kind of a mistake is this? Will equity afford A any relief, and if so, what relief?

A. Mutual mistake of fact. If A has executed deed before mistake is discovered, equity will order instrument cancelled.—6 Cyc 286.

1227. What is the distinction, if any, between rescission and cancellation?

A. Rescission is an equitable right on the part of one person to have a voidable instrument surrendered by another. Then cancellation, or the equitable remedy, is applied and the instrument is made void.—See Bispham's Equity Sec 472; See Black's Law Dict.

REMAINDERS

1228. **What is a remainder? Classify and define the different estates in remainder.**

A. An estate limited to take effect and be enjoyed after another estate is determined.—II Black 163.

Remainders are vested and contingent.—See Question 1234.

1229. **What is the difference between a remainder and a reversion?**

A. A remainder is an estate conveyed by grantor to grantee to take effect in enjoyment after the termination of particular estate. It is a conventional estate. A reversion is an estate left in the grantor to vest in him after the termination of some particular estate granted to some other person. It is a legal estate.—II Black 164-175.

1230. **What is a cross remainder? Give an illustration.**

A. Where land is devised or conveyed to two or more persons as tenants in common, or where different parts of the same land are given to such persons in severalty, with such limitations that, upon the determination of the particular estate of either, his share is to pass to the other, to the entire exclusion of the ultimate remainderman or reversioner until all the particular estates shall be exhausted, the remainders so limited are called "cross remainders."—Black's Law Diet; II Washburn Real Property 233.

An estate to A and B so long as both of them may live; remainder to survivor, is an example.—See *Picot v Armistead* 37 NC 226.

1231. **What are the three rules upon which the doctrine of remainders depends?**

- A. 1. There must be a particular estate upon which the remainder depends.
2. The remainder must pass out of the grantor at the time of the creation of the particular estate.
3. The remainder must vest during the continuance of the particular estate, or *eo instanti* it expires.—II Black 164-168.

1232. **What is an executory device, and in what material respects does it differ from a remainder?**

A. It is a disposition of lands made by will whereby no estate vests at death of testator, but only upon the happening of some contingency.

1. It needs no particular estate to support it.
2. A fee may be limited after a fee.
3. A remainder may be limited upon a chattel interest after a particular estate for life created for same.
—II Black 172, 173.

1233. What is the difference between a conditional limitation and an executory device?

A. A conditional limitation is a condition followed by a limitation over to a third party in case the condition be not fulfilled or where there is a breach of it. An executory device is a device of lands not to take effect until the happening of some certain event.—II Black 155, 172.

1234. What is the difference between a vested and a contingent remainder?

A. In a vested remainder there is a right of property now existing in the remainderman to be enjoyed in futuro, but which can not be defeated. In a contingent remainder the remainderman has no right at the present, but merely the possibility of having some right upon the happening of the contingency.—II Black 168, 169.

1235. What is the estate that is required to support both a contingent and a vested remainder?

A. The particular estate that must support a contingent remainder must be a freehold, and an estate for years may support a vested remainder.—II Black 167, 171.

1236. What is the test by which to determine whether a remainder is vested or contingent?

A. "The present capacity of taking effect in possession, if possession were to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines, universally distinguishes a vested remainder from one that is contingent."—Richardson v Richardson 152 NC 705, 68 SE 217.

1237. What are the three rules applicable to contingent remainders?

A. The contingency

1. Must not be too remote, *potentia remotissima*.
2. May be defeated by the determining of the particular estate before it vests.
3. Cannot be limited upon an estate less than freehold.—II Black 169, 170.

1238. How many kinds of contingent remainders, and what is the difference?

A. Two: those limited to an uncertain or dubious person, and those limited upon an uncertain and dubious event.—II Black 169.

1239. What is the difference at common law and under our statute as to the rights of the remainderman to a part of the crops cultivated by a tenant of a life tenant, upon the death of the life tenant during the current year?

A. At common law the administrator of the life tenant would be entitled to the rent of the growing crops, but under our statutory law the rent is divided between the administrator of life tenant and remainderman in proportion to time elapsed before death.—Con Stat 2347.

1240. When must a remainder pass out of the grantor, and when must it vest in the grantee?

A. It must pass out of the grantor at the time of the creation of the particular estate, and must vest in the grantee during the continuance of the particular estate, or *eo instanti*, it expires.—II Black 167.

1241. Land is devised by A to B, his grandchild, for life, and if he dies without leaving children, then to the rest of his heirs. What estate, if any, do B's surviving children take, and how do they take it?

A. B's children take fee simple upon death of B.—Hauser v Craft 134 NC 319, 46 SE 756.

1242. Suppose a devise be to A for life, and should he die without children, then over to other. What estate, if any, do A's surviving children take?

A. They would take by way of remainder upon death of A.—Hauser v Craft *supra*.

1243. A devised land to his son B for life with the remainder to B's children for life in equal shares to be held in severalty with cross remainders, and then with remainders in fee to the person whom the survivor of B's children might by will appoint. Are the limitations including the power valid? Is any one of them within the rule against perpetuities?

A. The limitation is valid. Not within the rule against perpetuities.

SALES

REQUISITES AND VALIDITY OF CONTRACT, 1247.

PERFORMANCE OF CONTRACT, 1249.

WARRANTIES, 1256.

REMEDIES OF SELLER, 1267.

REMEDIES OF BUYER, 1270.

1244. What is a sale of personal property, and in what respects does it differ from a bailment?

A. A sale is a contract by which, for a pecuniary consideration called price, one transfers to another an interest in property.—Black's Law Dict.

In a sale the title passes to the vendee absolutely; in a bailment the bailee has a qualified title.—II Black 453.

1245. What is meant by "potential existence" when used in connection with the ownership of personal property?

A. Property which exists in possibility but not in reality, as the product of a crop planted but not harvested.

1246. What is a chose in action?

A. A right to things personal of which the owner has not the possession, but merely a right of action for their possession.—II Black 396.

REQUISITES AND VALIDITY OF CONTRACT.

1247. Can there be a valid sale of goods not yet in existence? Give reason.

A. Yes, if the goods had a potential existence at the time sale was made.—Atkinson v Graves, 91 NC 99; Hurley v Ray 160 NC 376; 76 SE 234.

1248. When is the sale of goods complete, if the seller and buyer live at different places and the goods are to be transported from one to the other by a common carrier on an open bill of lading?

A. Title passes to purchaser upon delivery to carrier when goods are transported on an open bill of lading.—Bank v RR 153 NC 346; 69 SE 261.

PERFORMANCE OF CONTRACT.

1249. Is the delivery of goods always necessary for the completion of a contract of sale? State the rule with respect thereto.

A. Delivery is only necessary when it is mentioned as a condition upon which the contract or sale depends.—*Jenkins v Jarrett* 70 NC 255; *Richardson v Ins Co* 136 NC 314; 48 SE 733.

1250. If goods ordered are shipped by a common carrier, when does the title pass to the buyer?

A. Upon delivery to carrier, unless sold to be delivered at the station of the buyer, or upon other condition.—*Elliott v RR* 155 NC 235, 71 SE 339.

1251. When goods are ordered and shipped, in whom is the title while in transitu?

A. In the buyer.—*Hunter v Randolph* 128 NC 91, 38 SE 288.

1252. When does delivery to the carrier by the seller amount to delivery to the buyer?

A. In all cases unless they are sold to be delivered at place of buyer, or unless they were shipped subject to the orders of the seller, or in some similar way to insure payment before delivery.—*Hunter v Randolph* 128 NC 91, 38 SE 288.

1253. A delivers goods to a common carrier at Richmond, consigned to himself at Raleigh, "notify B." He endorses the bill of lading and sends it, with a sight draft on B for the purchase price of the goods attached, to a Raleigh bank for collection. B pays the draft on presentation and receives the bill of lading, and upon delivery of the goods finds that they have been damaged by negligence in transportation. Who can sue the company to recover damages, and why?

A. B, because the title to the goods vests in him upon payment of the draft.—*Latham v Spragins* 162 NC 404, 78 SE 282.

1254. When goods are ordered to be forwarded by express C. O. D. and are delivered to the express company, who may maintain an action against the company in case the goods are lost, the buyer or the seller, and why?

A. The Supreme Court holds that the title does not pass until delivery, consequently the seller alone could maintain the action.—*Sims v RR* 130 NC 556, 41 SE 673.

1255. **A agrees to sell B a steam saw mill and B accepts. The parties designate a future day to complete said contract. In the meantime the mill is destroyed by fire. Does the loss fall on A or B?**

A. The loss would fall on A, as the contract is not complete and the title to the mill still remains in him.—See Question 285.

WARRANTIES.

1256. **Define a warranty at common law, and explain difference between such covenants of warranty, and a warranty in deed existing at law.**

A. In real property: A real covenant by the grantor of lands, for himself and his heirs, to warrant and defend the title and possession of the estate granted, to the grantee and his heirs forever.

In personal property: A warranty is a statement or representation made by the seller of goods, contemporaneously with and as a part of the contract of sale by which he promises or undertakes to insure that certain facts are, or shall be, as he then represents them.—Black's Law Dict; Whigham v Hall 8 Ga App 509, 70 SE 23.

At common law if the title was disputed, the tenant might vouch or call the lord or donor to insure his gift, which if he failed to do, and the vassal was evicted, the lord was bound to give him another feud of equal value. Under the existing law the warranty compels the grantor upon eviction of grantee to pay damages. The former was more against the land, the latter against the person.—See Britton v Ruffin 123 NC 67, 31 SE 271.

1257. **Is there any implied warranty in a sale of personal property, and if so, what is it?**

A. Yes, always implied warranty of title.—II Black 450; Hodges v Wilkinson 111 NC 56, 15 SE 941.

1258. **In a sale is there any implied warranty of quality?**

A. "It is a principle of the common law that no warranty of quality is implied in the sale of goods. **Caveat emptor.** In the absence of fraud, if the article proves to be of bad quality, the purchaser has no redress, unless he has taken the precaution to require a warranty. This rule is founded in wisdom; and its practical good sense is so well fitted to the habits of our trading people that we are disposed to adhere to it. It seems that the exceptions to this rule are: (1) where the sale is for a particular purpose; (2) by sample; (3) by particular description, or where it is made by the manufacturer or pro-

ducer.—35 Cyc 399. Along with this principle as to implied warranties is another of equal importance and prominence, and that is that the seller is held to the duty of furnishing property in compliance with the contract of sale, that is, at least, merchantable or salable.”—Ashford ete Co v Schrader Co 167 NC 45, 83 SE 29.

1259. Does the warranty fall on the person or the property of the warrantor?

A. In sales of real property it falls on the property.—Britton v Ruffin 123 NC 67.

In sales of personal property it falls on the person.—Whigham v Hall 8 Ga App 509, 70 SE 23.

1260. A sells B a horse which he warrants to be sound. The horse is not sound. B brings an action to recover damages for breach of warranty. What is the measure of damages?

A. The difference between the agreed price and the value.—Mfg Co v Gray 124 NC 322 (326), 322 SE 718.

1261. A buys goods by sample, and nothing is said about warranty. Is there any implied warranty, and if so, what?

A. Yes, that the goods will be as good as the sample.—Ashford ete Co v Schrader 167 NC 45, 83 SE 29.

1262. A sells an article of personal property to B, which B has not seen, for a stipulated price. A refuses to warrant the article, which is worthless when received by B. Can B recover the purchase price paid for the article? Give the reason.

A. No, because he has taken the article subject to all defects.—Machine Co v McClamrock 152 NC 405, 67 SE 991.

1263. A sells a horse, the horse being present, at which sale nothing is said about warranty. Does A warrant anything, and if so, what?

A. Yes, he warrants the title.—II Black 451.

1264. A purchased a horse from B on January first, 1920. The next day after sale and delivery of the horse, A, supposing that the horse was unsound, proposed to return the horse and receive the money back. B declined the proposition but thereupon warranted the horse to be sound. Several

days later it was learned that the horse was worthless when the trade was made, but such was not known to B. What action can A maintain against B, and why?

A. None, because the warranty was without consideration. A warranty must be given as a part of the contract of sale, or must be based upon new consideration.—*Underwood v Curn Motor Car Company* 166 NC 458, 82 SE 855.

1265. Explain the doctrine of caveat emptor. When does it apply?

A. "Let the buyer beware." The doctrine means that the buyer of an article must examine, judge and test it for himself, being bound to discover any obvious defects and imperfections.—*Black's Law Dict.*

It applies when the article was present at the sale, and the buyer takes it subject to all defects that he might have found by reasonable diligence.—*Clark on Contracts* 223-226.

1266. What is meant by caveat emptor, and when does it apply?

A. "Let the buyer beware." This means that the buyer of an article must examine, judge and test it for himself, being bound to discover any obvious defects or imperfections. It applies when the purchaser did not use due diligence to discover the defects of which he complains.—*Smathers v Gilmer* 126 NC 757, 36 SE 153.

REMEDIES OF SELLER.

1267. Define stoppage in transitu. When does the right cease?

A. The act by which the unpaid vendor of goods stops their progress and resumes possession of them while they are in course of transit from him to the purchaser. This right ceases when the goods are actually delivered to the buyer.—*Farrell v RR* 102 NC 390, 9 SE 302.

1268. When goods have been sold and delivered on an agreement that the buyer is to give his note for the price, payable in one year, with interest, and the buyer, upon delivery, refuses to give the note, what remedy has the seller?

A. He may take possession of the goods, or may sue for the value of the same. The buyer, upon his breach of the contract, has discharged the seller of the same.—*Clark on Contracts* 243.

1269. **A** buys from **B** on credit a bill of goods while in transit and before reaching their destination **A** fails in business and becomes insolvent. What remedy has **B** as to the goods?

A. Stoppage in transitu.—Question 1267.

REMEDIES OF BUYER.

1270. If **A** buys goods by sample and they do not come up to the sample, what remedy has **A**, and has he any more than one?

A. He may refuse to accept the goods, or may accept the goods and sue for damages.—*Mfg Co v Gray* 124 NC 322, 32 SE 718.

1271. **A** buys goods by sample, and when the goods are received they do not come up to the sample. What remedy has **A**, and has he more than one?

A. He has two remedies. He may either take the goods and recover damages for deficiencies, or he may refuse to receive the goods.—*Mfg Co v Gray supra*.

1272. When **A** buys shoes by sample and upon receipt of them pays for them without examination, and upon subsequently finding that they are unsalable, returns the shoes, can he recover back the money paid?

A. Yes, that is, if they are unsalable on account of not coming up to the sample.—*Ashford etc Co v Schrader* 167 NC 45, 83 SE 29.

1273. **A** contracts to sell **B**, for manufacturing purposes, one hundred bales of cotton of specified weight, at ten cents per pound to be delivered March first, 1916. On March first cotton of a like grade is eleven cents per pound. **A** fails to deliver. **B** at that time can procure the amount of cotton at eleven cents, but fails to do so. Cotton continues to advance until June first, when it reaches twelve and a half cents per pound. **B** then sues. What is the measure of damages?

A. The difference between contract price and market value at time specified for delivery.—*Wilson v Wiggins* 87 SE 92; *Tillinghast v Cotton Mills* 143 NC 268, 55 SE 621.

1274. **A** promises to give **B** a horse and deliver the horse on the first day of January, 1914. **A** refuses to deliver the horse. Can **B** maintain an action to recover it? Give reason.

A. No.—See Question 1289.

1275. A steals B's horse and sells him without notice and for value to C. C exchanges with D. B sues for the horse. Can he recover? Has D any remedy against C? If so, what is it, and why?

A. B can recover because it is his horse, and he has never parted with the title. D can sue C on his implied warranty of title, which is present in every sale of personal property.—II Black 451.

SEDUCTION

1276. In indictment for seduction under promise of marriage in which the testimony of the woman is competent, is the jury forbidden by our statute to take it as true if unsupported? If so does our law, in any other instance, deny the jury the right to act upon testimony which may to them be true?

A. Jury cannot convict on unsupported testimony of woman in cases of seduction.—Con Stat 4339.

“The further requirement that the ‘unsupported testimony of a woman shall not be sufficient to convict’ is not required by our laws as to any other offence.”—State v Moody 172 NC 972; 90 SE 900.

Note: The statute provides (Con Stat 4225) that in cases of abduction of married women, that no conviction shall be held upon the unsupported testimony of such married woman; and it is also provided by the United States Constitution, Art III Sec. 3, that “no person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.”

SET-OFF AND COUNTERCLAIM

1277. A sues B before a justice of the peace on a note for \$100 and B owns a note against A for \$1,000. Can B avail himself of his note against A? If so, how?

A. He may set it up as a set-off and prevent recovery by A, and it seems that he need not remit excess over \$200, but the court is not exactly clear on this.—Cheese Co v Pipkins 155 NC 394; 71 SE 442.

1278. What is meant by a counterclaim, and what are its requisites?

A. It is an independent cause of action existing in favor of the defendant and against the plaintiff, between whom a several judgment might be had. It must be:

1. A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the same subject of the action.

2. In an action arising on contract, any other cause of action arising also on contract, and existing at the commencement of the action.—Con Stat 521.

1279. What is a counterclaim and how does it affect the right of the plaintiff to take a nonsuit, or to enter a retraxit?

A. "Subject to the limitations expressed in this statute, a counterclaim includes well-nigh every kind of cross-demand existing in favor of the defendant against the plaintiff in the same right, whether said demand be of a legal or equitable nature. It is said to be broader in meaning than set-off, recoupment or cross-action and includes them all, and secures to the defendant the full relief which a separate action at law or a bill in chancery or a cross bill would have secured to him on the same state of facts."—*Smith v French* 141 NC 7, 53 SE 435.

Where counterclaim is pleaded under first sub-section, plaintiff cannot take a nonsuit and thereby debar defendant from prosecuting his counterclaim or from having tried any other right set out in the answer.—*Well Co v Ice Co* 125 NC 80, 34 SE 198.

1280. What is the difference between recoupment, counterclaim and set-off?

A. Recoupment is the act of rebating or recouping a part of the claim on which one is sued by means of a legal or equitable right resulting from a counterclaim arising out of the same transaction, generally regarded as in the nature of a cross-action, the right of the plaintiff to sue being admitted, the defendant alleging that he has been injured by a breach of another branch of the same contract, and claiming to keep back so much of the plaintiff's damages as will satisfy the damage that has been suffered by the defendant.

A set-off is a counter demand which a defendant holds against a plaintiff arising out of a transaction extrinsic of the plaintiff's cause of action, the object of which is to liquidate the whole or a part of plaintiff's demand, according to the amount of the set-off.

A counterclaim is a claim presented by a defendant in opposition to or in deduction from the claim of plaintiff. It embraces, as a general rule, both recoupment and set-off, although broader and more comprehensive than either.—34 Cyc 623; *Ilurst v Everett* 91 NC 399; *Electric Co v Williams* 123 NC 51, 31 SE 288.

SHERIFFS AND CONSTABLES

1281. Where there is no sheriff in the county, who is required to execute a process, criminal or civil?

A. The coroner.—Con Stat 1021.

1282. Can a minor be deputy sheriff and execute the duties of that place according to our decisions?

A. In the absence of any statute making a deputy sheriff an officer, or making provisions as to his age, a minor may be appointed deputy, though Constitution Article Six, Sections four and five, provides that an officer shall be 21 years old.—Jamesville etc R Co v Fisher 109 NC 1, 13 SE 698.

1283. When a sheriff has sold any property, by virtue of his office, and shall go out of office before executing deed to the same, who can execute the conveyance?

A. The sheriff who sold if alive and in the state. If dead or removed from the state, his successor in office.—Con Stat 995.

SIGNATURES

1284. Is a signature made by a rubber stamp and affixed by the party or by his authority valid?

A. Yes.—State v Hall 142 NC 710, 55 SE 806.

SPECIFIC PERFORMANCE

1285. Under which of the three general heads of equity jurisdiction does specific performance fall, and what is meant by specific performance?

A. It falls under the head of equitable remedies. It is the power of the equity courts to compel a man to perform his contract instead of allowing him to pay damages for failure to do so.—Bispham's Equity Sec 361 et seq.

1286. As a general rule, when will a contract be specifically enforced and to what contracts does specific performance most usually apply?

A. See Question 1290. It applies most frequently to contracts to sell land.

1287. What was the equitable doctrine in regard to the enforcement of contracts to sell personal property by requiring specific performance?

A. As a general rule, such contracts are not enforceable in

specific, because the remedy is ordinarily adequate, but if breach of contract cannot be adequately redressed by damages, specific performance will lie.—Bispham's Equity Sec 368.

1288. What consideration is required to support a suit for specific performance?

A. A valuable consideration.—Bispham's Equity Sec 29.

1289. What kind of consideration is required for the specific performance of a contract?

A. A valuable consideration. "It may consist in some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other."—Bispham's Equity Sec 373.

1290. What fundamental principle must exist before specific performance will be decreed?

A. Must be a contract binding at law which has been infringed and remedy at law is inadequate.—Bispham's Equity Sec 29.

1291. Give the different kinds of property to which the doctrine of specific performance applies.

A. Real and personal.

STATUTES

1292. What are the rules for the interpretation of laws?

A. To interpret a law we must inquire after the will of the maker, which may be collected from the words, the context, the subject matter, the effects and consequences, and the spirit and reason of the law.—1 Black 59 et seq.

1293. What are the signs considered in the interpretation of laws at the common law?

A. See Question 1292.

1294. What are the rules with regard to the construction of statutes?

- A. 1. There are three points to be considered in the construction of all remedial statutes; the old law, the mischief and the remedy.
2. A statute which treats of persons or things of an inferior rank can not, by any general words, be extended to those of a superior.
3. Penal statutes are to be construed strictly.
4. Statutes against frauds are to be liberally and beneficially expounded.

5. One part of a statute must be so construed by another that the whole may, if possible, stand.
6. A saving totally repugnant to the body of the act is void.
7. Where the common law and a statute differ, the common law gives place to the statute, and an old statute gives place to a new one.
8. If a statute that repeals another is itself repealed afterwards, the first statute is thereby revived without any formal words for that purpose.
9. Acts of Parliament derogatory from the power of subsequent Parliaments bind not.
10. Acts of Parliament that are impossible to be performed are of no validity.—Black Introduction Sec 3.

1295. What presumption exists as to the law of another state—common law and statute—when any dispute arises in regard to it in our courts, and what proof of such law is required?

A. If not pleaded and proved, the presumption is that the common law and statute law of another state is the same as it is in this state.—*Lassiter v RR* 136 NC 89, 54 SE 1003.

The books containing the reports of adjudicated cases are proof of the common law of another state and a printed copy of a statute contained in a book purporting to have been published by the authority thereof is a sufficient proof of the statute law of another state.—*Con Stat* 1749, 1750.

1296. When acts of the legislature are in conflict with the constitution what is the result?

A. They are void.

1297. Would an ex post facto law enacted by the Parliament of England be a binding and valid regulation?

A. There is no written constitution in England, but custom and usages would declare it void.

1298. What is a retroactive law, and is such a law enacted by Congress or State Legislature valid, and if so, to what extent?

A. It is a law that applies to matters already passed. It is valid if it does not impair the obligation of contracts.—*Anderson v Wilkins* 142 NC 154, 55 SE 273.

1299. **On the question of the constitutionality of a statute what rule of construction prevails?**

A. The construction must be favorable to its constitutionality if possible.—*Malloy v Fayetteville* 122 NC 480 (483), 20 SE 880.

1300. **Can an act of the Legislature be constitutional in part and unconstitutional in part? If so, state the reasons why.**

A. Yes, the reason being based upon the principle that in construing statutes the legislative intent is controlling.

“The unconstitutional do not affect the constitutional parts of a statute, unless all the provisions are connected in the subject matter, depending on each other, operating together for the same purpose, or otherwise so connected together in meaning, that it cannot be presumed that the legislature would have passed the one without the other.”—*Riggsbee v Durham* 94 NC 800 (805).

1301. **Is there any express authority conferred by the State Constitution on the Courts to hold a statute passed by the legislature unconstitutional, or is it an inference drawn by the courts? If there is any express provision conferring such authority, please quote it.**

A. “There is, it is true, no express power given the courts by the letter of the Constitution to declare an act of the General Assembly unconstitutional, but it has been exercised in this state without ever being denied (in a proper case) since it was first held in *Bayard v Singleton* 1 NC 5.”—*State v Shuford* 128 NC 588, 38 SE 808.

1302. **In what ways can a statute be repealed, and how many kinds of repeal are there?**

A. It may be repealed by a special statute for that purpose or by passing another statute in conflict with it. Repeal is express or implied.—*Waynesville v Satterthwait* 136 NC 226, 48 SE 661.

1303. **In the absence of an express repealing clause, when is a statute repealed by implication?**

A. When the subsequent one is in conflict with it.—*Ibid.*

SUBROGATION

1304. **What is subrogation?**

A. Where one is secondarily liable for a debt and pays it, he is subrogated to all the rights that the creditor has against the one that was primarily liable.—*Bispham's Equity* Sec 335.

1305. What is the doctrine of exoneration?

A. Exoneration is the right that one secondarily liable for a debt and who has discharged it, has to compel the one primarily liable to repay him what he has paid out.—Bispham's Equity Sec 331.

Note: The difference between these two seems to be that in exoneration the one secondarily liable has the right to look to the one primarily liable to repay him, while subrogation is the right that the one secondarily liable has to all the securities which the original creditor had against the one primarily liable. Exoneration is the right of the one secondarily liable to look to the one primarily liable to discharge the debt, or to repay him if he has discharged it. Subrogation is the right that the one secondarily liable, who has discharged the debt, has to be placed in the position of the former creditor.

1306. Where a debt is secured by a mortgage and a person pays a part of it at the request of the debtor, can he enforce his claim against the security in the hands of the creditor, or must he look to the debtor alone for reimbursement? What doctrine of equity applies to the case, and in what way?

A. He can enforce his claim against the security, being subrogated to the rights of the former creditor.—Bispham's Equity Sec 335.

TAXATION

1307. What general rule is required by the Constitution of this state to be observed in the exercise of taxation?

A. Taxes must be uniform and not exceed two dollars on poll, and poll tax must always be equal to the tax on property valued at three hundred dollars.—Kitchen v Wood 154 NC 565, 70 SE 995; NC Const Art V Sec 1.

1308. What is the requirement of our Constitution in regard to uniformity in the assessment and taxation of property?

A. "Laws shall be passed, taxing by a uniform rule, all moneys, credits, investments in bonds, stocks, joint stock companies or otherwise; and also all real and personal property according to its true value in money."—NC Const Art V Sec 3.

1309. What is the equation of taxation, and is the Legislature required to observe it when tax is not levied for ordinary expenses of state and county government?

A. That the poll tax shall always be equal to that on \$300 valuation of property.—66 NC 655 (Appendix).

The equation need not be observed when tax is not levied for ordinary expenses of state and county government.—NC Const Art V Sec 6; RR v Commr 148 NC 220, 61 SE 690.

1310. State the provisions of the Constitution of this state, if any, which authorize the state to exempt its own obligations from the payment of money for taxation. If none, under what power is it done?

A. None. It may be done by the Legislature, as there is no provision in the Constitution forbidding it.—Pullen v Corporation Commission 152 NC 548; 66 SE 586.

1311. What restriction does the State Constitution impose on counties and towns as to the contraction of debts and levying taxes by them?

A. Cannot be done except for necessary expenses, unless by a vote of the qualified voters.—NC Const Art VII Sec 7.

1312. Can a city, town, or county, being authorized by the Legislature to expend a certain sum for a necessary expense, exceed the sum? State the reason.

A. They cannot. The act of the Legislature limits the amount to be expended, and not merely the amount of the bonds to be issued.—Highway Com v Webb 152 NC 710; 68 SE 211.

1313. If the object for which a tax is levied by a municipal corporation comes within the general designation of necessary expenses, who must determine whether the expense is necessary in the particular case?

A. The court may determine what class of expenditures fall within the definition of the necessary expenses of a municipal corporation, but the authority for determining the kind of buildings, etc., or their reasonable cost, is vested in the Legislature and to a municipal corporation when it is delegated to it, and not in the courts.—Hightower v Raleigh 150 NC 569, 65 SE 279.

1314. What rule does the Constitution prescribe for the taxation of property, trades, professions, franchises and incomes?

A. Power is given to the Legislature to levy such taxes.—NC Const Art V Sec 3.

1315. Is the upkeep of public roads a necessary expense of a county government?

A. Yes.—Herring v Dixon 122 NC 220, 29 SE 368.

1316. As to the poll tax, what restriction does the Constitution impose as to the limit of the amount that can be levied by the state and county and as to the purpose for which it can be used?

A. "The General Assembly shall levy a capitation tax on every male inhabitant of the state over twenty-one and under fifty years of age which shall be equal on each to the tax on property valued at three hundred dollars in cash. The commissioners of the several counties may exempt from capitation tax in special cases, on account of poverty and infirmity, and the state and county capitation tax combined shall never exceed two dollars on the head.

"The proceeds of the state and county capitation tax shall be applied to the purposes of education and the support of the poor, but in no one year shall more than twenty-five per cent. thereof be appropriated to the latter purpose.—NC Const Art V Secs 1 and 2.

1317. For what purpose can a county, township, city or town incur a debt or levy a tax without the vote of a majority of the qualified voters therein?

A. For necessary expenses.—NC Const Art VII Sec 7.

1318. When a county proposes to exceed the limitation of taxation, as fixed by Art. 5, Sec. 1 of our Constitution for a purpose not involving a necessary expense, how may it proceed to do so lawfully, and is this procedure affected by any amendment to the Constitution, and, if so, what is it?

A. For convenience, the summary as to the constitutional provisions in regard to taxation is given below:

- "1. For necessary expenses, the county commissioners may levy up to the constitutional limitation without a vote of the people or legislative permission.
- "2. For necessary expenses, the county commissioners may exceed the constitutional limitation, by special legislative authority, without a vote of the people.—Const Art V Sec 6.
- "3. For other purposes than necessary expenses, a tax cannot be levied either within, or in excess of, the constitutional limitation except by vote of the people under special legislative authority.—Const Art VII Sec 7."—RR v Commrs 178 NC 449; Herring v Dixon 122 NC 420; 29 SE 368.

1319. **What property is exempt from taxation under the Constitution, and what power has the General Assembly to exempt from taxation?**

A. "Property belonging to the state and to municipal corporations shall be exempt from taxation. The General Assembly may exempt cemeteries, and property held for educational, scientific, literary, charitable, or religious purposes; also wearing apparel, arms for muster, household and kitchen furniture, the mechanical and agricultural implements of mechanics and farmers; libraries and scientific instruments, or any other personal property to a value not exceeding three hundred dollars.'"—NC Const Art V Sec 5.

TENANCY IN COMMON

1320. **How are tenants in common seized?**

A. They are seized *per my et non per tout*.—II Black 192.

1321. **How may a tenancy in common be terminated?**

A. By uniting all interests in one person, or by partition.—II Black 194.

1322. **How may the unities in tenancy in common be destroyed?**

A. Unity of possession may be destroyed by partition, or by one tenant acquiring the interest of all the others. Tenancy in common has but the one unity.—II Black 194; *McLawhorn v Harris* 156 NC 107; 72 SE 211.

TORTS

1323. **What is a tort?**

A. A tort is a cause of action not arising out of contract for which a suit for damages may be maintained.

A violation of a non-contractual legal right.—Sec Cooley on Torts 1 et seq.

1324. **What is the difference between a tort and a breach of contract?**

A. A tort is an omission or commission of an act by one without right, whereby another receives some injury, directly or indirectly, in person, in property or in reputation. A breach of contract is a violation of an engagement or agreement.

The main points of difference are these: Parties are liable for torts severally and are not entitled to contribution; the

action abates upon the death of either party in a great many torts; persons not liable for their contracts may be liable for their torts.—See Cooley on Torts 1 et seq.

1325. When is one person liable for the torts of another?

A. One person is liable for the torts of another when the tort is committed by the latter's authority, express or implied.—*Kelly v Traction Co* 132 NC 368; 43 SE 923.

1326. By the law of what place is it determined whether a particular act or conduct of a person is a tort or actionable wrong?

A. The act or omission must have been wrongful by the law or the place where it occurred. The party must be guided by the law in force at the time and place, and to which he owed obedience.

1327. When are persons properly said to be joint tortfeasors?

A. A joint tortfeasor is one who participates in doing a wrongful act, or one who ratifies the act after it was committed.—Cooley on Torts 124 et seq.

1328. What is the usual effect of a release in full given by the injured parties to one of several joint tortfeasors?

A. It releases the others.—Cooley on Torts 139; *Burns v Womble* 131 NC 174; 42 SE 573.

1329. If one of two joint tortfeasors is compelled to pay damages for the tort to the injured party, is there any case in which he may recover against the other wrongdoer?

A. "The rule that the wrongdoers cannot have redress or contribution against each other is confined to cases where the person seeking redress must be presumed to have known that he was doing an unlawful act."—Cooley on Torts 142.

1330. A builds a house upon his own premises so as to obstruct the light and air which would otherwise have free access to his neighbor's house. What remedy, if any, has the latter against him?

A. He would have no remedy.—Cooley on Torts 690.

TRIAL

1331. When the trial is by jury, what are the duties of the court?

A. To charge the jury as to the law, but leave them to determine the facts.—Con Stat 564.

1332. **Upon a trial, at what time should prayer for instructions be asked?**

A. At the close of the evidence, according to the usual practice, but statute fixes no time.—Con Stat 565.

1333. **What is a special verdict?**

A. A special verdict is that by which the jury finds the facts only, leaving the judgment to the court.—Con Stat 585.

1334. **What is a general verdict?**

A. A general verdict is that by which the jury pronounces, generally upon all or any of the issues, either in favor of the defendant or of the plaintiff.—Con Stat 582.

TRUSTS

CREATION, EXISTENCE AND VALIDITY, 1351.

CONSTRUCTION AND OPERATION, 1366.

MANAGEMENT AND DISPOSAL OF TRUST PROPERTY,
1368.

1335. **What is a trust, and what is necessary to create it?**

A. A trust is a beneficial title or ownership of property of which the legal title is in another.—Bispham's Equity Sec 20.

The conveyance must be coupled with a trust, either express or implied. The trust must be accepted.—Adam's Equity 27.

1336. **In what courts prior to 1868 was the jurisdiction to enforce trusts?**

A. Courts of Equity.—See NC Const (1868) Art IV Sec 1.

1337. **What is a charitable trust? Give example.**

A. A gift to a general public use which extends to the poor as well as to the rich. Example: A gift for the support of a hospital.—Bispham's Equity Sec 124.

1338. **What is a parol trust? Give an illustration.**

A. A parol trust arises where land is conveyed to one who has agreed verbally to hold it in trust for another.

A agrees with B to buy a tract of land from C to convey it to B upon payment of a certain sum. A buys the land and has it conveyed by C to himself. Here is a parol trust in favor of B.—Davis v Kerr 141 NC 11; 53 SE 519.

1339. What are the methods of creating a trust pointed out by Chief Justice Pearson in a leading case, and what was the case?

- A. 1. By transmission of the legal estate, when a simple declaration will raise the use or trust.
2. By contracts based upon valuable consideration, to stand seized to the use of or in trust for another.
3. A covenant to stand seized to the use of or in trust for another, upon good consideration.
4. Where the court by its decree converts a party into a trustee, on the ground of fraud. The case was *Wood v Cherry* 93 NC 110.—*Chappell v White* 146 NC 571 (575); 60 SE 635.

1340. Who introduced the doctrine of uses into England, and for what purpose?

A. It was introduced by the ecclesiastics to avoid the statute of mortmain.—II Black 328.

1341. What is a use in reference to real property?

A. It was a method of conveying land by which the legal title in the land vested in one, but the beneficial interest in another.—II Black 328.

1342. Who had the legal estate and what was he called, and what was the holder of the use called?

A. The legal estate was in the grantee usually called the *terre tenant*. The holder of the use was called the *cestui que use*.—II Black 328.

1343. What was the purpose and effect of the statute of uses, and what conveyances had their force and effect thereunder?

A. Its object was to abolish uses, or equitable estates, and it failed because it did not apply to estates for years, nor to a use limited upon a use, nor to conveyance where the holder of the legal title had to keep possession of the land in order to give effect to the use.—II Black 333.

Conveyances under the statute of uses were bargain and sale, lease and release, deeds to lead or declare uses, and deeds of revocation of uses.—II Black 340.

1344. What uses by construction of the courts were excepted from the statute?

A. Contingent uses during the contingency, chattel interests in terms of years, and active trusts where it was necessary for feoffee or trustee to retain possession to carry out trust, and a use upon a use.—II Black 335, 336.

1345. How were trusts affected by the statute of uses?

A. The statute of uses was intended to abolish all uses where this statute applied, but this it failed to do under the decisions, especially in Byrell's case, in which it was held that the statute did not apply to a use limited upon a use. In all cases where the statute did not execute the use the chancery courts enforced the rights under the name of trusts. These cases were classified under six heads:

1. Contingent uses which are not executed during the suspense of the contingency.
2. Uses limited of copyhold estates.
3. Devises to uses.
4. Active trusts.
5. Uses limited of chattel interests.
6. A use upon a use.—Bispham's Equity See 53.

1346. What effect did the statute 27 Henry VIII. have upon the system of uses, and for the correction of what evils was it passed?

A. It did not materially effect the system of uses, just caused a change in words in creating equitable estates and changed the name from uses to trusts.—II Black 332-336.

It was held previous to the passage of the statute of uses:

1. Nothing could be granted to use whereof use was inseparable from possession.
2. Use could not be raised without sufficient consideration.
3. Uses were descendable according to the rules of common law.
4. Uses might be assigned by secret deeds, no livery of seizin being necessary.
5. Uses were not liable to feudal burdens.
6. Uses were not subject to dower and curtesy.
7. Could not be reached by the legal process for debt.

To correct these the statute named above was passed.—II Black 332, 333.

1347. What is the difference between a springing and a shifting use?

A. A springing use is one to take effect and be enjoyed in the future upon the happening of some contingency. A shifting use is one that upon some contingency shifts from one to another. A conveys land to B to hold over to the use of C,

after his marriage with D. This is a springing use. A conveys to B to hold over to the use of C till D shall marry, and then to the use of D. This is a shifting use.—II Black 334-335.

1348. What Act of Parliament was generally termed the statute of uses, and what did it provide?

A. 27 Henry VIII. It provided that the legal title should vest in the cestui qui use.—II Black 332.

1349. What gave rise to the conveyance called lease and release and how did it operate?

A. It was "a species of conveyance much used in England, said to have been invented by Serjeant Moore soon after the enactment of the statute of uses, and it is thus contrived; a lease, or rather, bargain and sale upon some pecuniary consideration for one year is made by the tenant of the freehold to the lessee or bargainee. This, without any enrollment, makes the bargainor stand seized to the use of the bargainee, and vests in the bargainee the use of the term for one year, and then the statute immediately annexes the possession. Being thus in possession, he is capable of receiving a release of the freehold, and reversion which must be made to the tenant in possession, and accordingly, the next day a release is granted to him. The lease and release, when used as a conveyance of the fee, have the joint operation of a single conveyance."—Black's Law Dict.

1350. What is the difference between a use and a trust?

A. Originally the difference seems to have been that a use was permanent and a trust temporary in its nature, but since the statute of uses the term trust is applied to a use which was not executed by the statute.—Bispham's Equity Sec 52.

CREATION, EXISTENCE AND VALIDITY.

1351. Can a trust be created upon land by parol? If so, in what way, and when?

A. Yes, where land is conveyed to a person who at the time of, or prior to the time of, the conveyance agrees to hold it in trust for a third person. This parol trust is enforceable.—Davis v Kerr 141 NC 11; 51 SE 519.

1352. What are the two general classes of trusts, and how may they be created?

A. Implied trusts created by law.

Express trusts created by parties.—Avery v Stewart 136 NC 426, 48 SE 597; Bispham's Equity Sec 20.

1353. **How are express trusts divided? Give an illustration.**

A. Active: An estate to A to hold, manage and control and pay rents and profits to B.

Passive: An estate to A to hold in trust for B.—Webb v Borden 145 NC 188 (196); 58 SE 1083.

1354. **What is the difference between active and passive trusts?**

A. In active trusts the trustee has some duty to perform in connection with the trust estate; in passive trusts he is the holder of the naked legal title.—Bispham's Equity Sec 54.

1355. **What is the difference between an active and passive trust, and how does each affect the title to land?**

A. "ACTIVE TRUSTS: A trust is active when the interposition of the trustee is necessary to carry out its purposes with respect to immediate or remote beneficiaries, and whenever it is necessary for the accomplishment of any object of the creator of the trust that the legal estate should remain in the trustee, the test being that the trustee has imposed upon him, expressly or by implication, some active and substantial duty to perform, or useful purpose to subserve, or discretion to exercise, with respect to the control, protection, management or disposition of the trust property, such as the investment or reinvestment and care of property; or raising a certain sum of money for some prescribed purpose from the income of the estate; or the receipt and payment over of the rents, income, profit, or proceeds of the trust property to or for another with remainder over, as in the case of a trust for a spendthrift or person **non sui juris**, or the maintenance of a separate estate for a married woman; or the preservation of estates for those in remainder; or to protect the estate for a given time, or until the death of some person, or until division, or the sale of the property and use of the proceeds for some prescribed purpose, such as distribution among beneficiaries; or the conveyance of the trust property to the beneficiary or beneficiaries after a life-estate or the happening of some specified event, which requires that the legal estate remain in the trustee. In all these cases the legal estate does not vest in the **cestui que trustent** and the use is not executed by the statute in them, until the trustee shall have completed the last active duty imposed upon him by the trust, even though all the **cestui que trustent** are **sui juris**, and are authorized to direct and control the action of the trustees, and also to remove them and substitute others in their place, the title of the trustee continuing as long as it is necessary to support the title of the **cestui que trust** or until its objects are accomplished and the trust

executed, and the **cestui que trust** taking no legal interest or estate in the property, but having the right to enforce the performance of the trust. And where an active duty is imposed upon a trustee, although it be merely the formal or ministerial duty of conveying the estate, the trust is not executed by the statute of uses until the duty has been, or may be presumed to have been, performed. Nor is a trust executed where the trustee is entitled to a beneficial interest or estate in the trust property.

"PASSIVE TRUSTS: A trust is simple, passive, or dry when the trustee has no active duty to perform, or when the trust serves no purpose, or none that would not be equally served without it, the trustee being the mere depositary of the naked title, charged with no duty and without power to take possession, or manage, or exercise any control over the property. In such cases the statute of uses executes the use by converting it into a legal estate in the beneficiary no ultimate purpose of any kind requiring the continuance of the trust. So, under the statute, where the trust is a mere simple, passive, or dry one, no estate or interest passes to the trustee, although the most express words of trust are used. At the most the trustee takes but a momentary seizin to serve the use which the statute executes by transferring the legal estate to the beneficiary named, and the whole legal and equitable estate is merged and vests immediately and directly in the beneficiary. The seizin and possession thus transferred is not a seizin and possession in law only, but is actual seizin and possession in fact, not a mere title to enter upon the property, but an actual estate, and the **cestui que trust** may convey the estate and pass a good title without the intervention of the trustee, and may maintain ejectment for the recovery of land in his own name without a previous conveyance from the trustee."—39 Cyc 213.

1356. **How are implied trusts divided? Give an example of each.**

A. Resulting and constructive.

A conveys land to B, purchase money paid by C. Here is a resulting trust in favor of C.

A conveys land to B in order to avoid payment of debt to C. Here a constructive trust would arise by judgment of the court declaring B trustee for C.—Gorrell v Alsbaugh 120 NC 362; 27 SE 85.

1357. **Do implied trusts fall under the head of the statute of frauds?**

A. No.—Avery v Stewart 136 NC 426; 48 SE 397; Bispham's Equity Sec 82.

1358. **What is the distinction between resulting and constructive trusts?**

A. A resulting trust is one that arises from the conveyance itself or from the attending circumstances.

A constructive trust arises by a judgment from a court declaring the legal owners trustees on account of fraud.—*Avery v Stewart supra*; *Bispham's Equity* Sec 20, 78.

1359. **What is the difference between resulting and constructive trusts, and how are they created?**

A. A resulting trust is a trust raised by implication or construction of law and presumed to exist from the supposed intention of the parties and the nature of the transaction.

Constructive trusts are those which arise purely by construction of equity and are entirely independent of any actual or presumed intention of the parties. They are also known as trusts *ex maleficio* or *ex delicto*.—39 Cyc 26.

They are created by courts of equity.

1360. **What are the leading classes or instances of resulting trusts?**

- A. 1. Where a purchaser pays the purchase money but takes the title in the name of another.
2. Where a trustee or other fiduciary buys the property in his own name but with trust funds.
3. Where the trusts of a conveyance are not declared, or are only partially declared, or fail.
4. Where a conveyance is made without any consideration and it appears from circumstances that the grantee was not intended to take beneficially.—*Avery v Stewart supra*.

1361. **What is the exception to the general doctrine of resulting trusts?**

A. Where purchase money is paid by parent and deed made to child, it is presumed to be an advancement and not a resulting trust.—*Bispham's Equity* Sec 84.

1362. **What is a constructive trust?**

A. A constructive trust exists purely by construction of law, without reference to any actual or supposed intention to create a trust, for the purpose of asserting rights of parties or of frustrating fraud.—*Avery v Stewart supra*.

1363. What relief was afforded in equity where the legal title was obtained through fraud?

A. Equity will construe the holder of the legal title to be a trustee of a constructive trust, or the contract may be rescinded and cancelled.—*Sumner v Staton* 151 NC 198; 65 SE 902.

1364. What is meant by a trustee *ex maleficio*, and when may a person be so declared?

A. "In general, whenever the legal title to property, real or personal, has been obtained through actual fraud, misrepresentations, concealments, or through undue influence, duress, taking advantage of one's weakness or necessities, or through any other similar means or under any other similar circumstances which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity imposes a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same, although he may never perhaps have had any legal estate therein; and a court of equity has jurisdiction to reach the property either in the hands of the original wrongdoer, or in the hands of any subsequent holder, until a purchaser of it in good faith and without notice acquires a higher right, and takes the property relieved from the trust. The forms and varieties of these trusts, which are termed *ex maleficio* or *ex delicto*, are practically without limit. The principle is applied wherever it is necessary for the obtaining of complete justice, although the law may also give the remedy of damages against the wrongdoer."—*Edwards v Culberson* 111 NC 347; 10 SE 233.

1365. A conveys land to B upon a parol agreement that the latter will hold the same for A, the grantor, and convey the legal title to him when requested to do so. Is the trust an enforceable one?

A. No.—*Newton v Clark* 174 NC 393; 93 SE 899.

CONSTRUCTION AND OPERATION.

1366. Where a person acquires trust property without notice of the trust, and without having paid anything of value for it, what is the nature of the title to his property?

A. He holds as trustee.—*Tankard v Tankard* 84 NC 286.

1367. What is the difference between a mortgagee and a trustee?

A. A mortgagee holds the property in trust for himself to secure a payment of his debt. A trustee holds in trust for a cestui que trust for some purpose not necessarily to secure payment of debt.—Bispham's Equity Sees 20, 21.

MANAGEMENT AND DISPOSAL OF TRUST PROPERTY.

1368. If a valid trust has been created and the trustee named is incompetent to act, what becomes of the trust?

A. The court will appoint a trustee.—Con Stat 2583.

“A trust never fails for want of a trustee.”

1369. What are the four principal duties of a trustee?

A. He is bound to use the property for the purposes of the trust only.

To account for and protect the trust property while the trust continues.

To restore it to the parties entitled to it when the trust is at an end.

Not to avail himself of his fiduciary capacity for personal benefit.—Adam's Equity 55 et seq.

1370. If a trustee speculates with trust property and makes a profit, to whom does the profit belong?

A. It belongs to the cestui que trust, on the principle that a trustee cannot use trust property for personal benefit.—Adam's Equity 60.

1371. What remedies has a cestui que trust when the trust property has been wrongfully disposed of by the trustee?

A. Cestui que trust may follow trust property. If it cannot be followed in specie, or the person in possession cannot be made liable to the trustee, the trustee will be decreed to compensate the cestui que trust by payment of the value of the property so lost, and also to account for all rents, hires, interest and other profits which would or might have been made from the property so lost.—Freeman v Cook 41 NC 373.

1372. Are trustees entitled to contribution for a breach of trust where there is no actual fraud?

A. Yes.—Adam's Equity 268.

1373. Where a naked trust is created, and conveyance is to two trustees, and one dies, who can execute the trust?

A. The surviving trustee.—Con Stat 1736.

USURY

1374. What is the effect of usury upon a contract?

A. Forfeits all interest; if the interest is paid, double the amount may be recovered.—Con Stat 2306.

If security is taken by chattel mortgage, conditional sale, or otherwise, upon household or kitchen furniture, usury is a misdemeanor.—Con Stat 4509.

1375. A held five notes of B for \$200 each, secured by a mortgage. The notes were dated January 1, 1908, and one was due January 1 of each succeeding year. Each note bore interest from date until paid at 6 per cent. per annum. On June 1, 1910, B tenders to A the amount of the principal and interest to June 1, and demands cancellation of the notes and surrender of the mortgage. A declines to accept, but offers to surrender the notes upon payment of the principal and interest according to the tenor of the notes. B pays the amount and sues A for usury. Was the contract usurious? Give reason.

A. No, because it was not a loan, but only requiring a person to abide by the terms of a contract which was lawful. Usury is taking more than the law allows upon a loan or forbearance of a debt.—*Smithwick v Whitley* 152 NC 366; 67 SE 914.

1376. Is a promissory note embracing usurious interest good in the hands of an innocent purchaser for value before maturity? Upon whom is the burden of proof when this defense is pleaded?

A. Not as to the usurious interest. Burden of proof is on one alleging usury.—*Ward v Snugg* 133 NC 489; 18 SE 717.

VENDOR AND PURCHASER

CONSTRUCTION AND OPERATION OF CONTRACTS, 1378.
REMEDIES OF PURCHASER, 1381.

1377. What is an option and when is it binding so that it cannot be withdrawn?

A. An option is a unilateral contract, a contract to give another the right to buy, and not a contract to sell, an obligation by which one binds himself to sell property at a fixed price within a certain time, leaving it discretionary with the other party to buy.

If not based on valuable consideration, the right to buy may be withdrawn at any time before acceptance, but if there

is a valuable consideration to support it, the right continues during the period fixed in the option.—*Winders v Kenan* 161 NC 628; 77 SE 687.

CONSTRUCTION AND OPERATION OF CONTRACT.

1378. A agreed with B that he would sell and convey to him certain real estate; nothing was said as to the form of the conveyance. When the time arrived for the execution and delivery of the deed A tendered B a quit claim deed. B demanded a deed with general warranty. What kind of deed must A execute and deliver?

A. Deed with general warranty.—*Fairecloth v Isler* 75 NC 551.

1379. What is the legal effect of conveying land in which the grantor has only an expectancy or a possibility of inheritance, or of selling personal property not in esse?

A. In either case it would amount to a contract to convey; in real property, when grantor actually inherited, and in personal property, when it came into existence.—*Vick v Vick* 126 NC 123; 35 SE 257. But see also II Black 290, where contrary view is taken.

1380.

Raleigh, February 1, 1919.

“Received of John Doe, \$100.00 on sale of my home place.

(Signed by vendor)

“RICHARD ROE.”

The full consideration being \$1,000.00, is this a sufficient memorandum under the statute?

A. It is as to vendor, but not as to vendee.—*Hall v Mesenheimer* 137 NC 183; 49 SE 104.

REMEDIES OF PURCHASER.

1381. In such contracts purporting to bind the vendor, is it required that the consideration be expressed, and how in reference to the vendee?

A. Not required as to vendor but is required as to vendee.—*Hall v Mesenheimer supra*.

1382. A agrees to sell B a certain tract of land by parol. He signs a deed and deposits it with C in escrow. Can B enforce the agreement? Give reason.

A. A verbal agreement to pay a specified sum for land on a specified day in accordance with a contract in writing to sell land, signed by the vendor only, will not support an action

for specific performance against the purchaser, as Code Sec. 1554 (Con. Stat. 988) provides that such contracts shall be void unless in writing and signed by the party to be charged therewith.—Davis v Yelton 127 NC 348; 37 SE 464.

1383. **A agrees to sell B the timber on a tract of land for \$4.00 per thousand feet. They agree upon a competent man to measure the timber, who reports in good faith 200,000 feet and B pays A. It is afterwards discovered there are only 100,000 feet of the timber. Has B any remedy? Give reason.**

A. Yes. B may sue A for the overpayment. He bought 200,000 feet of timber and only received 100,000.

1384. **A agrees to sell B a tract of land. B pays a part of the purchase price and enters into possession and makes valuable improvements and A then refuses to convey the land to B. There is no writing. What are the rights of B?**

A. If B has complied with his part of contract, he is entitled to recover purchase money paid and the increased value of the land by reason of the improvements, less the rents and profits received by him.—Johnson v Armfield 130 NC 575; 41 SE 705.

1385. **Does the doctrine of caveat emptor apply to sales of land, or only to sales of personal property?**

A. It may be applied to sales of land.—Smathers v Gilmer 126 NC 757; 36 SE 153.

1386. **If the doctrine of caveat emptor applies to sales of land, can this doctrine be invoked after the sale is made?**

A. No.

VENUE

1387. **What is meant by the venue of an action?**

A. The venue is the county from which the jury has to come who are to try the issue.—Bouvier's Law Dict.

Note: Under our civil procedure the venue of an action is the county prescribed by statute for the bringing of the action.

1388. **Under title V of the Code of 1883 of Civil Procedure, Chapter 10, how is the place of trial of actions arranged?**

A. I. Where subject matter is situated:

1. For the recovery of real property or any interest therein.
2. For partition of real property.
3. For foreclosure of mortgages on real property.
4. For recovery of personal property.

II. Where cause of action arose:

1. For penalties given by statute.
2. For damages against officer for failure to discharge his duty, or misconduct in office.

III. Where plaintiff or defendant reside.—Con Stat 463, 464, 468.

1389. **What actions must be brought in the county in which the subject matter of the action is situated?**

A. All actions for the recovery of land, for partitions, for foreclosure or mortgages thereon, or any other interest connected with land. Actions for the recovery of personal property should be brought in the county in which such property is situated.—Con Stat 463.

1390. **In what county may an action be brought against a foreign corporation?**

A. In county in which cause of action arose, or in which such corporation usually did business, or in which it has property, or in which the plaintiff or either of them shall reside, in the following cases:

1. By a resident of this state for any cause of action.
2. By a plaintiff not a resident of this state when the cause of action shall have arisen or the subject of the action shall be situated within the state.—Con Stat 467.

1391. **Where (venue) may the plaintiff bring his action to recover the amount, principal more than \$200 due on a bond?**

A. Where plaintiff or defendant reside or if defendant is not within the state, then in the county in which plaintiff in his summons may designate.—Con Stat 468.

WASTE

1392. **What is waste and what are the different kinds, and by whom can an action for waste be maintained?**

A. Spoil or destruction, done or permitted, to lands, houses, gardens, trees or other corporeal hereditaments, by the tenant thereof, to the prejudice of the heir, or of him in reversion or remainder.—II Black 282.

It is voluntary or permissive. Action may be brought by anyone injured by the waste.—Black's Law Dict. See *Richardson v Richardson* 152 NC 705; 68 SE 217.

1393. **What estates in North Carolina are impeachable for waste, and what is the penalty?**

A. Estates for life, for years, and those held by guardians. Treble damages if not paid on or before the day specified in the judgment. The place wasted may be recovered.—*Con Stat* 889-897.

1394. **A enters upon land and with the consent of the life tenant cuts the timber thereon and sells it to B, who purchases in good faith and for value. The logs when severed are worth \$100 when on the land and \$200 when they are sold to B. What remedies, if any, has the remainderman against B? If he can recover damages, what is the measure?**

A. An action for waste. Measures of damages would be the diminished value of the land.—40 *Cyc* 534.

The judge may give judgment for three times the amount of the damages assessed by the jury, and also that the plaintiff recover the place wasted if the amount of the judgment is not paid on or before a day named by him.—*Con Stat* 893.

WATER AND WATERCOURSES

1395. **Where land borders on a river, to whom does the bed of the stream belong, and with reference thereto, distinguish between navigable and non-navigable rivers.**

A. In the case of non-navigable rivers, it runs to the thread of the stream, or *filum aqua*. In navigable rivers, the line follows the water mark.—*State v Eason* 114 NC 787; 19 SE 88; *Rowe v Lbr Co* 138 NC 465; 50 SE 848.

1396. **What are the respective rights of B and C to the water and the land under the water?**

A. See Question 1397.

1397. **What right has a riparian owner to water flowing through or past his land; may he divert the stream from its natural course, and if so, to what extent and for what purpose?**

A. He has only a usufructory right. He may divert the course of the stream upon his own land, but cannot divert it to the prejudice of the other riparian owners.—*Durham v Cotton Mills* 141 NC 615; 54 SE 453.

1398. **What is accretion?**

A. It is the gradual gain of land along the edge of a watercourse either by washing up sand and earth, or by the sinking back of the waters below the usual water mark.—II *Black* 261.

WILLS

NATURE AND EXTENT OF TESTAMENTARY POWER, 1415.

TESTAMENTARY CAPACITY, 1418.

CONTRACTS TO DEVISE OR BEQUEATH, 1420.

REQUISITES AND VALIDITY, 1421.

PROBATE, 1430.

CONSTRUCTION, 1439.

RIGHT AND LIABILITIES OF DEVISERS AND
LEGATEES, 1452.

1399. Is there any inherent right in the owner of property to dispose of the same by will, or that in the absence of a will it should devolve upon his heirs at law or next of kin, or is the disposition of the decedent's property in the power of the legislature absolutely?

A. The way by which a man's property is disposed of after his death depends entirely upon the statute, as he has no inherent right to dispose of it.—*Pearl v Edwards* 170 NC 64; 86 SE 807.

1400. Why was land not devisable at common law?

A. It was devisable prior to the introduction of the feudal tenures. After that the title was in the king, and the tenant had nothing to devise until after the statute of wills was passed.—II Black 375.

1401. Were lands devisable by will in England before the conquest of that country by the Normans?

A. Yes.—II Black 373.

1402. When did the right of devising freehold lands by will become complete and universal in England?

A. By Statute of Wills, 32 Henry VIII.—II Black 375.

1403. When was the Statute of Wills passed?

A. In 1541.—II Black 375.

1404. What are the provisions of the Statute of Wills in respect to devises of land?

A. That all persons being seized in fee simple (except *femes covert*, infants, idiots and persons of nonsane memory) might by will and testament in writing, devise to any other person, except to bodies corporate, two-thirds of their lands, tenements and hereditaments held in chivalry, and the whole of those held in socage.—II Black 375.

1405. Were corporate bodies excepted by these statutes, and what was the reason?

A. Yes, to prevent extension of gifts in mortmain.—II Black 375.

1406. Did wills drawn under the act of Henry VIII pass lands acquired after their execution?

A. No.—II Black 375.

1407. What statute in England required wills to be in writing, and why?

A. The Statute of Frauds, 29 Car. II. It was enacted to prevent frauds and perjuries.—II Black 376.

1408. What is the law of North Carolina on the subject, and if a change, to what is it owing?

A. Will passes all lands owned at death of testator at his death if the terms are sufficient to include it. This is to prevent testator from dying intestate as to a part of his property.—Con Stat 4165; Hines v Mercer 125 NC 71; 34 SE 106.

1409. What was the difference at common law in the legal effect of a fine and a common recovery?

A. They were similar in effect, but a fine seems to have been used to convey estates in tail in possession and interests to married women. Common recoveries were used for the same purposes when it was desired to convey such estates and remainders and reversions depending upon them.—II Black 355, 363.

1410. How many kinds of wills are there?

A. Three:

The ordinary or usual form of will, signed by testator and attested by witnesses.

Holograph will, or one wholly in the handwriting of and bearing name of the testator, in which witnesses are not required.

Nuncupative will, or one which is not written at all, and only applies to personal property.—Con Stat 4144.

1411. Does the term “will” include a codicil?

A. Yes.—Con Stat 3949, Rule 9.

1412. **What is the difference between a gift cause mortis and a nuncupative will?**

A. In the gift there must be an actual or constructive delivery. That is not necessary in the case of a will; there must be two witnesses to a nuncupative will, while one will do in the case of a gift cause mortis.—Ibid.

1413. **Is a nuncupative will valid in North Carolina, and will it pass real estate?**

A. It is valid in North Carolina, but will not pass real estate.—Smith v Smith 63 NC 637.

1414. **Is a holograph will valid in North Carolina, and will it pass real estate?**

A. It is valid in North Carolina, and will pass real estate.—Con Stat 4144.

NATURE AND EXTENT OF TESTAMENTARY POWER.

1415. **Who may make a will in this state?**

A. Any sane person over twenty-one years old.—Con Stat 4128, 4129.

1416. **Suppose an unmarried man makes a will and subsequently marries and dies without making another will. Will he die testate or intestate; Give reason.**

A. He will die intestate. Marriages revoke will.—Con Stat 4134.

1417. **What was the common law in regard to the capacity of married women and infants to make wills? What is the law in North Carolina?**

A. Neither could make wills by the common law. A married woman can, but an infant cannot, under the North Carolina law.—Con Stat 4128, 4129.

TESTAMENTARY CAPACITY.

1418. **In this state what are the qualifications for making a valid will?**

A. The testator must be of sound mind and memory and twenty-one years of age.—Con Stat 4128.

1419. **What is the standard fixed by our decisions for testamentary capacity?**

A. The testator should have capacity to know what property he has and wishes to dispose of, and should know and

understand the relationship he bears to his property and the persons to whom he is giving it, and he should understand the nature of the act in which he is engaged.—*In re Thorpe* 150 NC 487; 63 SE 676.

CONTRACTS TO DEVISE OR BEQUEATH.

1420. What would be the legal effect of a contract by A to make a will in favor of B? Is a valuable consideration necessary to support such a contract? In case of breach of such contract, what, if any, remedies would a party have?

A. Without valuable consideration it would be void, but if based on valuable consideration it would be valid to the extent of the recovery of the consideration, or B might demand specific performance.—*Price v Price* 123 NC 494; 45 SE 855.

REQUISITES AND VALIDITY.

1421. What are the requisites necessary to the formal execution of a will written by some one besides the testator?

A. It must be signed by the testator, and by two witnesses who must sign in the presence of the testator.—*Con Stat* 4131.

1422. Can a written will, properly attested, be revoked, in whole or in part, and what is essential to a valid revocation?

A. May be revoked.—See Question 1426.

1423. Are limitations by way of will or deed of personal property and chattels in remainder after a bequest for life good?

A. They are now, but were not by the ancient common law.—II Black 398.

1424. What is the effect of one of two subscribing witnesses in a will being a legatee or devisee under the will?

A. Being a legatee or devisee does not disqualify a witness from attesting the execution of a will; he may attest, but his legacy becomes void.—*Con Stat* 4138; *Vester v Collin* 101 NC 114; 7 SE 687.

1425. Can real estate be conveyed by an unwritten will, and if not, why?

A. No. Because it is an interest in lands, and must be in writing as required by the statute of frauds in other conveyances.—Questions 788, 799.

1426. How may a will be revoked?

A. By writing executed with solemnity similar to that necessary to make a will.

By burning, cancelling, or obliterating by the deviser, or in his presence by his consent.

By marriage, but not by birth of child.—Con Stat 4133, 4134.

1427. How may a written will be revoked? Can it be partially cancelled, and if so, how?

A. May be revoked by other will or codicil in writing, or other writing declaring the same, or by the burning, cancelling, or obliterating of the same by the testator himself, or in his presence and by his direction and consent.

May be altered by some other will or codicil in writing, or other writing of testator, all of which shall be in the handwriting of testator.—Con Stat 5123.

1428. What is meant by the republication of a will?

A. The re-execution or re-establishment by a testator of a will which he had once revoked.—Black's Law Dict; See also *Hatch v Hatch* 3 NC 32.

1429. If a paper purporting to be a codicil, properly executed, refers with sufficient certainty to another paper signed by the testator as his will, but not legally attested, will the codicil cure the defect in the execution of the other paper, if the latter is not physically attached to the codicil, and the witnesses to the codicil have never seen the paper? Explain fully.

A. This would not validate the will, as the paper upon which witnesses sign must be physically attached to the paper upon which testator signs.—*In re Baldwin's will* 146 NC 25; 59 SE 163.

PROBATE.

1430. State the different kinds of wills recognized in North Carolina and the character of proof necessary to admit each kind to probate.

A. See Question 1410 for kinds of wills.

Wills and testaments must be admitted to probate only in the following manner:

1. "In case of a written will, with witnesses, on the oath of at least two of the subscribing witnesses, if living; but when any one or more of the subscribing witnesses to such will are dead, or reside out of the state, or can not after due diligence be found within the state, or are insane or otherwise incompetent to testify, then such proof may be taken of the handwriting, both of the testator and of the witness or wit-

nesses so dead, absent, insane or incompetent, and also of such other circumstances as will satisfy the clerk of the superior court of the genuineness and the due execution of such will. In all cases where the testator executed the will by making his mark and where any one or more of the subscribing witnesses are dead or reside out of the state, or are insane or otherwise incompetent to testify, it shall not be necessary to prove the handwriting of the testator, but proof of the handwriting of the subscribing witness, or witnesses so dead, absent, insane or incompetent shall be sufficient. The probate of all wills heretofore taken in compliance with the requirements of this section are hereby declared to be valid.

2. "In case of a holograph will, on the oath of at least three credible witnesses, who state that they verily believe such will and every part thereof is in the handwriting of the person whose will it purports to be, and whose name must be subscribed thereto, or inserted in some part thereof. It must further appear on the oath of some one of said witnesses, or of some other credible person, that such will was found among the valuable papers and effects of the decedent, or was lodged in the hands of some person for safekeeping.

3. "In case of a nuncupative will, on the oath of at least two credible witnesses present at the making thereof, who state that they were specially required to bear witness thereto by the testator himself. It must also be proved that such nuncupative will was made in the testator's last sickness, in his own habitation, or where he had been previously resident for at least ten days, unless he died on a journey or away from home. No nuncupative will shall be proved by the witnesses after six months from the making thereof, unless it was put in writing within ten days from such making; nor shall it be proved till a citation has been first issued or publication been made for six weeks in some newspaper published in the state, to call in the widow and next of kin to contest will if they think proper."—Con Stat 4144.

1431. What is the effect of the probate of a will in a foreign state?

A. If a will is duly probated in a foreign state, a certified copy by ambassador, minister or commercial agent of the United States may be recorded in the office of the Clerk of the Superior Court of the county in which property of said testator is situated.—Con Stat 4153.

1432. What is meant by probating a will in common form? In case you were employed to contest such will, how would you proceed, and where would the case be tried?

A. The probate of a will in common form is made when the executor presents it to the probate court without having cited any of the parties interested and produces witnesses to testify to its validity. To contest such will, would proceed as in Question 1436. A will is probated in solemn form when all parties interested are cited or notified to appear at the time of probate, and the will is then duly proved by witnesses.—19 A & E Enc Law 180; See *In Re Beauchamp* 146 NC 254; 59 SE 687.

1433. May a will be admitted to probate where the testator and the subscribing witnesses also sign their names by mark?

A. Yes.—Schouler's Executors 104.

1434. How may a nuncupative will be admitted to probate?

- A. 1. There must be two credible witnesses specially requested by testator to bear witness thereto.
2. Must be proved that will was made in testator's last sickness.
3. Cannot be proved after six months unless reduced to writing within ten days from making thereof.
4. Citation must be issued.—Con Stat 4144 (3).

1435. A forged will is duly admitted to probate and B, a debtor of the testator, pays his debt to the executor, who has qualified. The genuine will is afterwards found and duly probated, and the executor having qualified thereunder, sues B for recovery of the same debt. Is he entitled to judgment, and would he be, if the first will had not been procured by fraud or undue influence?

A. A payment by a debtor to one who obtained letters of administration from a court of competent jurisdiction is a good discharge as to him, though the grant of letters be afterwards declared void.—*Hyman v Gaskins* 27 NC 267.

A bona fide payment of a debt to an administrator appointed under voidable letters discharges the debtor.—*Landon v Wilmington etc* RR 88 NC 585.

1436. Suppose a will is probated, how would you proceed to contest it, and what is the issue raised termed, and where is it tried?

A. File a caveat in the office of the Clerk of the Superior Court, and raise an issue of *devisavit vel non*, which will be tried in the Superior Court in term time.—Con Stat 4159.

1437. What is a caveat, and when may it be entered?

A. A formal objection to the probate of a will. It should be entered before probate, but may be done within seven years from the time of probate in common form.—Con Stat 4158.

1438. What is the effect of a widow's dissent from her husband's will?

A. The widow shall have the same right in the real and personal property of her husband as if he had died intestate; otherwise the will is valid.—Con Stat 4097.

CONSTRUCTION.

1439. What common rule of interpretation is applied to a will?

A. A will must be so construed as to effectuate the evident intent of the testator.—*Lynch v Melton* 150 NC 595; 64 SE 497.

1440. A will is made in this state disposing of realty and personal property in this state and also in another state. What laws govern as to its execution, validity and interpretation?

A. The law of the last domicile of the testator governs as to the personal property, and the law of the place where the property is situated as to the realty.—*Schouler's Executors* 26 et seq.

1441. Can a man by will defeat his wife's right to dower?

A. No.—Con Stat 4097.

1442. Can a married woman by devise defeat her husband's right to curtesy?

A. The Court says that she can under our Constitution.—*Tiddy v Graves* 126 NC 620; 36 SE 127.

1443. If there be two clauses in a will so totally repugnant to each other that they cannot stand together, how will they be construed?

A. The latter clause will stand.—II Black 381; *Blackwell v Blackwell* 124 NC 269; 32 SE 676.

1444. What is the rule of construction where real estate is devised without the quantity of the estate being mentioned?

A. A fee simple is conveyed.—Con Stat 4162.

1445. Can a fee be given after a fee in a deed or a will, and if so, by what kind of limitations?

A. Yes. If by deed it is a conditional limitation; if by will it is an executory devise.—*Springs v Hopkins* 171 NC 486 (494); 88 SE 774.

1446. Where a testator bequeaths a number of things out of a larger number belonging to him, as in a bequest of "ten of the horses in my stable," is the legacy good, and if so, has the legatee the right of selection?

A. Yes, the legacy is good and the legatee has the right of selection.—40 Cyc 1872.

1447. If a testator devises a tract of land to A for life and then to his own heirs, are the "heirs" those who are such at the testator's death, or at the expiration of the life estate?

A. Those who are his heirs at the time of the death of the testator.—*Jenkins v Lambeth* 172 NC 466; 90 SE 513.

1448. A testator dies leaving a will in which there is the following devise: "I hereby give to E, daughter of S, a tract of land (properly described) containing 105 acres, to the proper use of her and the heirs of her body, and if she dies and have no heirs of her body, then my other children to have the land." E has borne four children, three of whom survive her. What estate did E take in the land under the will, and what estate did the surviving children of E take, and how did they hold?

A. Under the rule in *Shelly's case* E took an estate in fee defeasible upon her dying without heirs of her body. If she held the land at her death, dying intestate, it would descend to her three children as tenants in common, unless the dead child left issue.—*Perry v Hackney* 142 NC 368; 55 SE 289.

1449. A devises land to B for her life, and at her death to the heirs male of her body by her husband C. What estate does B get by the devise?

A. B would get life estate. Rule in *Shelly's case* would not operate.—*Thompson v Crump* 138 NC 32; 50 SE 457.

1450. A devises land to B, and if B dies without leaving children, to C. If B dies leaving children, will they take the land, and if so, in what right? By purchase under the will, or by descent from their father? Give your reason.

A. They would take the land by descent from B. B takes fee defeasible upon his dying without children, but upon his death leaving children, the estate becomes absolute; and his children inherit.—See II Black 156.

1451. If A should grant an estate to B upon the condition that it should not be aliened, would the condition be valid? In this respect, is there any difference between an estate for life, and an estate in fee?

A. "A condition annexed to a conveyance in fee simple, by deed or will, preventing alienation of the estate by the grantee within a certain period of time, is void."—*Christmas v Winston* 152 NC 48; 67 SE 58.

Provisions in conveyance against the alienation of life estates are void except as to married women during life time of husband.—*Lee v Oats* 171 NC 717 (722); 88 SE 889.

RIGHTS AND LIABILITIES OF DEVISEES AND LEGATEES.

1452. From what time with reference to real and personal property comprised therein, does a will take effect?

A. From the death of the testator.—*Con Stat* 4165.

1453. When a testator has imperatively directed his property to be sold, and turned into money, what rule will control as to the subsequent devolution of the money, and why?

A. Equitable conversion, for equity considers that as done which ought to be done, so that the land is treated as money.—*Bispham's Equity* Sec 307. See Question 321 et seq.

1454. What is a legacy, and enumerate the different kinds.

A. A bequest or a gift of personal property by last will and testament.

Note: "By construction the word 'legacy' may be so extended as to include realty or interests therein when this is necessary to make a statute cover its intended subject matter or to affectuate the purpose of a testator as expressed in his will."—*Black's Law Dict.* The different kinds given by *Black's Law Dictionary* are: "Absolute, additional, alternative, conditional, contingent, cumulative, demonstrative, general, indefinite, lapsed, model, pecuniary, residuary, special, specific, trust and universal."

1455. Distinguish between a general, a specific and a demonstrative legacy, and in what order do they abate?

A. A legacy is general when its amount of value is a charge upon the general assets in the hands of the executors, and where, if these are sufficient to meet all the provisions in the will, it must be satisfied; it is specific when it is limited to a particular thing, subject, or chose in action, so identified as to render the bequest inapplicable to any other; as the bequest of a horse, a picture or a jewel, or a debt due from a person named and in special cases, even of a sum of money."—*Black's Law Dict.*

“ ‘A demonstrative legacy is a bequest of a certain sum of money, stock or other like, payable out of a particular fund or security. A demonstrative partakes of the nature of a general legacy by bequeathing a specific amount, and also of the nature of a specific legacy by pointing out the fund from which payment is to be made, but differs from a specific legacy in the particular that, if the fund pointed out for the payment of the legacy fails, recourse will be had to the general assets of the estate.’—*Crawford v McCarthy* 159 NY 515.

“ ‘Such a legacy is so far specific that it will not be liable to abate with the general legacies upon a deficiency of assets, except to the extent that it is to be treated as a general legacy after the application of the fund designated for its payment.’—*Gelbach v Shilvey* 67 Md 498.

General legacies abate first, then specific and demonstrative legacies; that is, demonstrative and specific legacies abate in the same class.—*University v Borden* 132 NC 476; 44 SE 47.

1456. What is ademption, and to what legacies does it apply?

A. Ademption of legacies applies, strictly speaking, to specific legacies, and arises where the testator in his lifetime makes a different disposition of his property. The term is sometimes applied to general legacies when they have been paid in the life of testator. This is properly called satisfaction of legacies.—*Grogan v Ashe* 156 NC 296; 72 SE 372; *Schouler's Executors* 601.

1457. What is meant by a lapsed legacy, and what by a residuary clause?

A. A lapsed legacy is one in which a legatee dies before the testator, or for any other reason is incapable of taking legacy at death of testator.—*Smith v Wiseman* 41 NC 540.

A residuary clause is one added after the specific legacies to dispose of whatever remains.—*Pigford v Grady* 152 NC 179; 67 SE 506.

1458. What is a lapsed legacy, and what becomes of the property given by it?

A. A lapsed legacy is one given to a legatee, and such legatee dies before the testator. The legacy never vests. By our statutes, if the dead legatee is lineal descendant of testator and leaves issue, the legacy will go to such issue, otherwise to the residuary legatee, if one, and if none, then it is undivided property, and goes as if no will had been made.—*Con Stat* 4168; *Smith v Wiseman* 41 NC 540.

1459. **A dies leaving a will in which he has devised one tract of land to his son and another to his nephew. The son and the nephew die before A, leaving children. What becomes of the devisee to the son and nephew, and why?**

A. Devise to nephew would lapse and pass under residuary clause. Devise to son would go to son's children.—Con Stat 4166, 4168.

1460. **Suppose there be no residuary clause in a will, what becomes of a lapsed legacy?**

A. If devisee were issue of testator, legacy would go to devisee's children. If devisee were not a person who would inherit, legacy would descend to heirs of deviser as if he had died intestate.—Con Stat 4168; *Howell v Mehegan* 174 NC 64; 93 SE 438.

1461. **When is a legacy said to be lapsed? And what is the legal effect of a legacy being void or lapsed?**

A. A lapsed legacy or devise is one which, although good and capable of effect at the time when the will was made, and never revoked by the testator, fails to take effect by reason of something which has occurred between the time of the making of the will and the time when the gift under the will would otherwise vest, as in case of death of beneficiary, etc.—40 Cyc 1925. If a legacy be void or lapsed, the property devised by it would go to residuary legatees except in case of specific legacies, in which it would go to heirs of testator.—Con Stat 4166; *Holton v Jones* 133 NC 399; 45 SE 765.

1462. **What is the doctrine of election?**

A. An election in equity is a choice which a party is compelled to make between the acceptance of a benefit under a written instrument, and the retention of some property already his own, which is attempted to be disposed of in favor of a third party, by virtue of the same paper.—*Bispham's Equity* Sec 295.

1463. **Give an illustration of the doctrine of election.**

A. If a testator gives money to A and by the same will attempts to give something of A's to B, here A must elect whether he will accept the bequest and stand by the terms of the will or keep what he already has.—*Bispham's Equity* Sec 295.

1464. **Upon what maxim of equity does the doctrine of election rest?**

A. "He who seeks equity must do equity."—*Bispham's Equity* Sec 25, 295.

1465. What is express election and what is implied election?

A. In express election the condition is annexed to the gift, as where testator gives B \$1,000 upon condition that he convey to A a certain tract of land. Implied election arises where the testator gives his own land or property and undertakes to give that of donee, as where a testator gives A land by will and by the same will, undertakes to give something of A's to B.—Bispham's Equity Sec 296.

1466. Must the intent to present a case of election appear on the face of the will, or is evidence dehors the will admissible to show the intentions?

A. Must appear on the face of the will.—Adam's Equity 95.

1467. If the electing party is an infant, or feme covert, who makes the election for them?

A. The court makes the election for them. Now a married woman would have the right to do so herself.—Duckworth v Jordan 138 NC 520; 51 SE 109.

1468. Is the electing party entitled, as a matter of right, to know the value of both interests?

A. Yes.—Adam's Equity 59.

1469. What is abatement of legacies, and in what order do they abate?

A. Abatement arises where testator did not leave property sufficient to pay debts, and legacies in full. The general rule is, a residuary legacy is to be taken for the payment of debts in the first instance; then general or pecuniary legacies; then specific legacies. When there are several legacies in the same class, the abatement is pro rata.—Alsop v Bowers 76 NC 168.

WITNESSES

1470. What protection, if any, is extended to parties and witnesses while attending Court?

A. "Every witness shall be exempt from arrest in civil actions or special proceedings during his attendance at any court, or before a commissioner, arbitrator, referee or other person authorized to command the attendance of such witness, and during the time such witness is going to and returning from the place of such attendance, allowing one day for every thirty miles such witness has to travel to and from his place of residence."—Con Stat 1808.

1471. **What substitute does the Code of Civil Procedure provide for a bill of discovery?**

A. Examination of parties before trial.—Con Stat 899-907.

1472. **Will an action lie against a witness in respect to his testimony—evidence?**

A. He might be indicted for perjury if he swore falsely. Civil action will not lie.—Godett v Gaskill 151 NC 52; 65 SE 612.

1473. **When a witness is asked a question which tends to disgrace him and answers the question, is the cross examiner bound by the answer so given?**

A. Yes.—I Green Ev Sec 449.

1474. **What is the rule as to the contradiction of a witness, and especially when it is proposed to show prior inconsistent statements? What foundation must be laid for the contradiction?**

A. A witness cannot be impeached by proving a statement different from the one sworn to, unless he has been examined as to his having made such statement.—State v Wright 75 NC 439 · Hooper v Moore 48 NC 428; See also Woodard v Blue 103 NC 109; 9 SE 492.

Testimony relating directly to the subject of litigation may be met by evidence of inconsistent facts, or contradictory statements previously made by witness, without first calling his attention to such facts or statements.—Jones v Jones 80 NC 246, citing Clark v Clark 65 NC 655; State v McQueen 45 NC 177.

1475. **What is the distinction between the competency and credibility of a witness?**

A. The competency of a witness refers to whether he ought to be allowed to testify. The credibility of a witness refers to the weight that the jury will attach to what he says.

1476. **What is the legal presumption as to the competency and incompetency of witnesses?**

A. A witness is presumed competent except when his appearance indicates a want of age.—Lockhart's Ev Sec 33.

1477. **Can a person who believes in God but who rejects the idea that Jesus Christ is divine be examined as a witness if he is otherwise competent?**

A. Yes.—State v Pitt 166 NC 268, 80 SE 1060.

1478. Is the husband or the wife incompetent to act as a witness in all cases where the other is a party?

A. See Questions 889, 890.

1479. When one party to a transaction is dead, under what circumstances is the other a competent witness in regard thereto?

A. If the executor or administrator or other person deriving title from deceased person is examined in his own behalf.—Con Stat 1795.

1480. When may a party to an action be examined as a witness and when not under the Code?

A. He may be examined in all cases except as to personal transactions with a person since dead or insane. In this state he cannot testify unless the personal representative, heirs at law, or persons claiming under such deceased person is examined in his own behalf.—Con Stat 1795.

1481. May either the judge who is presiding or a juror who is trying the case be sworn and examined as a witness in the case?

A. No, not according to the weight of authority.—I Green Ev Sec 364; Lockhart's Ev Sec 49.

1482. In trials at common law, could parties, as a general rule, be examined as witnesses in their own behalf? And what is our law at the present on this subject?

A. They are not competent witnesses at common law. Under our statute they may testify except as to personal transactions with persons since dead or insane.—40 Cyc 2244; Con Stat 1795.

1483. Suppose a witness has been sworn and examined on a trial of an action, and he subsequently dies. Is his evidence admissible in a subsequent action between the parties, and under what circumstances?

A. It is admissible between the same parties about the same matter and in the same action or another proceeding if the question in issue and parties are substantially the same.—Bryan v Mallory 90 NC 508.

1484. When is the credibility of a witness in issue?

A. Always.

1485. **The competency of a witness is a matter of law for the court, and his credibility for the jury. Can one charged with a capital felony be convicted upon the unsupported testimony of an accomplice?**

A. "In some jurisdictions an accomplice must be corroborated but in North Carolina the unsupported testimony of an accomplice is sufficient to convict if the jury believe him. It is usual for the judge to instruct the jury to be cautious in convicting on such testimony."—Lockhart's Ev Sec 63.

1486. **Upon what grounds will the testimony of a witness be rejected unheard?**

A. When he is incompetent either on account of insensibility of obligation of oath, or on the ground of mental incapacity.—Con Stat 1795.

1487. **Can a party either impeach the character of his own witness who has surprised him by his testimony or contradict his evidence?**

A. "A party never shall be permitted to produce general evidence to discredit his own witness; but if a witness proves facts in a cause, which make against the party who called him, yet the party may call other witnesses to prove that those facts were otherwise. The other witnesses are not called directly to discredit the first witness, but the impeachment of his credit is incidental and consequential only."—Shelton v Hampton 28 NC 216.

1488. **When there is a new trial in a matter and a witness examined in a former trial has since died, can a party have the benefit of the testimony of such witness on the second trial? If so, how can it be obtained?**

A. Yes. "The testimony of a witness who, since his examination, has died, become insane, or otherwise non-available, may be introduced upon a second trial, provided it has been preserved or notes taken thereof, or some person who heard the witness testify can reproduce it."—Smith v Moore 149 NC 185 (190); 62 SE 892.

1489. **In actions for tort are the admissions of one defendant competent against his co-defendant when the act was committed by them jointly?**

A. "The mere fact that under the system of pleading adopted in a particular jurisdiction two persons may be joined as co-parties in the same action or that the practice exists of consolidating actions for convenience of trial does not make the statement of one party competent as against the other. Except in cases of identification in legal interest

by agency, privity, conspiracy, common design, joint interest, etc., such statements are incompetent against his co-parties. A mere community of interest will not make them competent even where, as in an action of a joint tort, or for divorce on the ground of adultery, the act charged, if committed at all, must have been committed by both parties; or where a common interest exists in a given property or claim under a legal or equitable title, or under a will, or by descent. The rule is the same in equity as at law, and applies to judicial as well as to extra-judicial admissions. The reason for inadmissibility of statements by one of two or more co-parties, severally liable, as against the others is still clearer where they are parties in different capacities; for example where one is sued as principal defendant and another as garnishee. The rule of exclusion has no application to a statement by one co-party made in the hearing of the others and not denied by them under circumstances rendering a reply appropriate if the facts were thought to have been incorrectly stated. Nor can it be applied to any statement which can be fairly deemed to have been made, authorized, or adopted by all the co-parties."—16 Cyc 981.

1490. Can counsel comment on the fact that a party in a civil action failed to testify? What is the rule in this respect as to defendant in a criminal action?

A. May in civil action. May not in criminal.—Lockhart's Ev Sec 50.



DEC 71



N. MANCHESTER,
INDIANA

